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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-6838

STACEY LANE, Petitioner

-vs-

STATE OF OHIO, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

OHIO SUPREME COURT

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No._____

STACEY LANE, Appellant

-vs-

STATE OF OHIO, Appellee

PETITION FOR WRIT OF CERTIORARI TO
OHIO SUPREME COURT

To the Honrable Chief Justice and Honarable Associate Justice of the Supreme Court of the United States:

Stacey Lane, the Petitioner herein, prays that a writ of certiorari issue to review the Judgment and sentence of Death of the Ohio Supreme Court entered in the above-captioned case or December 30, 1976.

OPINIONS BELOW

The Decision of the Ohio Supreme Court is reported at State v. Lane, 49 Ohio St. 2d 77 (1976) and is reproduced in the appendix hereto infra pages 1. The Decision and Journal Entry of the Ohio Court of Appeals, Ninth Judicial District is unreported and is reproduced in the appendix hereto infra pages 7 thru 20.. The Journal Entry of the Ohio Court of Common Pleas is unreported and is reproduced in the appendix, hereto infra pages 21.

JURISDICTION

The Decision of the Ohio Supreme Court (appendix infra, page 1) was entered on December 30, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257 (3)

QUESTIONS PRESENTED

1. Does the Imposition and Carrying Out of Petitioner's Death Sentence Violate the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States?
2. Does Refusal to Allow Petitioner to Voir Dire Potential Jurors on Capital Punishment Deny his Rights Under the Sixth and Fourteenth Amendments?

CONSTITUTIONAL PROVISIONS INVOLVED.

1. This case involves the First, Fourth, Fifth, Eight, and Fourteenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

1. This case also involves the following Provisions of Ohio Law Pertaining to Capital Punishment:

Ohio Rev. Code Ann. Section 2903.01 (1974). Aggravated murder.

> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
>
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Rev. Code Ann. Section 2929.02 (1974). Penalties for murder.

> (A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

Ohio Rev. Code Ann. Section 2929.03 (1974). Imposing sentence for a capital offense.

> (A) If the indictment or count in the indictment charging aggravating murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge, whether the offender is guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one ore more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined.

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by a jury.

(2) By the trial judge, if the offender was tried by a jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the argument, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise it shall impose sentence of life imprisonment on the offender.

Ohio Rev. Code Ann. Section 2929.04 (1974). Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was assassination of the president of the United States or person in line of succession to the presidency, or the governor or lieutenant governor of this state, or the president-elect or vice-president elect of the United States, or the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this divison, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist

was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of the course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance (preponderance) of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under stress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

STATEMENT OF THE CASE

On May 9, 1975 Petitioner was indicted by the Summit County Grand Jury of aggravated murder (Ohio Revised Code 2903.01 (B) with two specifications of aggravating circumstances (Ohio Rev. Code 2929.04 (A) (3) (7) along with one count of Aggravated Robbery (Ohio Rev. Code 2911.11) in connection with the homicide of Georgine Burse. [Indictment attached hereto appendix (hereinafter App.) at pp. 21-22]. Petitioner was arraigned on May 23, 1975 and entered a plea of not guilty.

Petitioner's trial was set for July 21, 1975 at which time voir dire of the jury was begun. Petitioner's trial counsel requested to voir dire the prospective jurors concerning their views on capital punishment. [Trial Transcript Vol. I (hereinafter cite as T.) at 58; App. at p. 24]. The trial court denied (T. Vol. I pp. 58-59; App. at pp. 24-25) the request and no mention was made of the death penalty during the entire voir dire of the jury.

After the voir dire, the trial commenced on July 22, 1975 at which time the State presented its case. The evidence with respect to the death of Georgine Burse was not in dispute.

On February [illegible], 1975 at 5:40 p.m. a deputy of the Summit County Sheriff's office found [illegible]e Burse dead in the florish shop which she owned, the victim of an apparent rob[illegible]ry. In Coroner's autopsy it was later indicated the victim had been shot six times in the head and neck. (T. Vol. II at 187). As part of Sheriff's Office investigation Petitioner was questioned the same evening by two detectives. Petitioner accounted for his whereabouts that afternoon having taken his mother to a nearby hospital and then met his brother William Sturm and the florist shop delivery man Richard Klusky. (T. Vol. II at 168). Petitioner, however was not indicted for two more months concerning the murder of Mrs. Burse.

Both brother's gave statements to the Sheriff's department which exculpated Petitioner from any connection with the killing of Mrs. Burse.

Later both Sturm and Trivonvich recanted their statements and gave new statements which incriminated Petitioner. At the same time of Petitioner's indictment both men were indicted for obstruction of justice because by their own admission they initially lied to the police to hinder the investigation and protect Petitioner. (T. Vol. II pp. 44-45, 118-120; App. infra at pp. 29-30, 36-38).

As to their particular testimony at trial, the new version of Rick Sturms story was that Petitioner had allegedly told him in the afternoon of February 28 of his plans to rob Georgine Burse's florist shop. These inculpatory statements were claimed to have been made while Petitioner, Rick Sturm, and Rudy Trivonvich were drinking at Petitioner's sister-in-law's apartment. (T. Vol. II pp. 34-35 App. at pp. 26-27) Rick Sturm claimed that he tried to dissuade Petitioner from his plans by telling him "You don't want to going back to the penitentary do you?" (T. Vol. II p. 35; App. at p. 26). Rick Sturm alleged further that he had driven to the florist shop with Petitioner and was outside in the car when he heard five shots from inside the shop. Sturm said he fled and claims he later saw Petitioner with the victim's purse and credit cards. These items along with the purported murder weapon were not introduced at trial.

After his direct examination, the Trial Court for the first time allowed Petitioner's counsel to view Sturm's statements to the Summit County Sheriff's Office (T Vol.II 46,47; App. at pp. 30-31). Before trial, defense counsel had moved for discovery of Sturm's and Trivonvich's testimony before the Grand Jury buth the motion was overruled. (T Vol. 1 at 27). On cross examination, Sturm admitted giving a false story, however, he claimed he did so only to protect the Petitioner. (T Vol. II 69, App. at p. 32). Sturm, however, had another motive to give his statement, since he had worked at the florish shop and quit his job over an argument with the victim's husband. (T Vol. II 70-71, App. at pp. 33-34) just two

months before the homocide. After the cross examination of Sturm was concluded, the defense asked to recall him later for more cross examination, which the Trial Court denied. (T Vol. II at 196-197).

As to the Petitioner's other brother, Rudy Trivonvich, he also admitted initially lying to the Sheriff's Office and was also charged with obstruction of justice. Trivonvich, as Sturm, claimed that Petitioner had told him of his plan to rob the florist shop and that he saw Petitioner with money from the robbery. (T Vol. II at 116-117). Trivonvich, however, had a lengthy record of both State and Federal charges. (T Vol. II 112-113) and by his own testimony was an admitted drug user. (T Vol. II 131). Trivonvich also was familiar with the Burse's florist shop and was acquainted with Mrs. Burse. The State rested and no evidence was presented on behalf of the Petitioner. The jury was duly charged and during the deliberations, at their request were reread, by the Court Reporter, the testimony of Sturm and Trivonvich concerning Petitioner's possession of the proceeds of the robbery. (T. Vol. II 273-274).

In the evening of July 24, 1975, Petitioner was found guilty as charged of aggravated murder for the purposeful killing of Georgene Burse while committing an aggravated robbery and the two specifications of aggravating circumstances that one, he killed the victim while committing, attempting to commit, or fleeing immediately after committing an aggravated robbery, and two, that his purpose in killing the victim was to escape detention, apprehension, or punishmert for the aggravated robbery. Petitioner also was found guilty of aggravated robbery. (T Vol. II 280-281 App. infra at pp. 38-39).

Pursuant to Ohio Rev. Code 2929.03-04 the jury was dismissed and Petitioner's case was continued pending a pre-sentence investigation and a psychiatric examination for the mitigation hearing to be held before the trial judge.

Petitioner's mitigation hearing was held on September 10, 1975 at which time four witnesses testified on behalf of the Petitioner, including his mother, a clinical psychologist, and two court appointed psychiatrists, and no witnesses testified on behalf of the State. The sole mitigating circumstance considered was whether the Petitioner could establish by a preponderance of the evidence that the "offense was primarily a product of the offender's psychosis or mental deficiency. . ." [Ohio Rev. Code 2929.11 (B)(3)].[1] At the hearing, the first witness, Petitioner's mother, who testified that in 1965 he had been in a serious automobile accident, suffering a fractured skull, at which time he was in a come for ten days, after which his behavior changed. (T Vol. III 24, 25 App. at pp. 40, 41).

The next witness, Dr. Kaiser, a clinical psychologist, who explained to the court the psychological testing he had done of Petitioner and the results of that examination. (Report App. at pp. 54-56). Dr. Kaiser revealed that Petitioner, age 25, has a brain disorder in area of memory recall, as well as being "drug dependent" and a "habitual excessive drinker."(App. at p. 56). The Doctor also found Petitioner to be a "paranoid personality with antisocial features." (App. at p. 56.). The conclusion of Dr. Kaiser was that while Petitioner was in the psychiatrically and psychologically mentally ill, he was not mentally ill in the legal sense of the term. (App. at p. 56).

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[1]The only two other mitigating factors provded under the Ohio capital punishment statute [Ohio Rev. Code 2929.11 (B)] were not presented at Petitioner's mitigation hearing and did not appear relevant. Ohio Rev. Code. 2929.11 (B)(1): First, "The victim of the offense induced or facilitated it." Based upon numerous gunshot wounds inflicted on the victim who apparently had been robbed, this factor in unlikely. Second, Ohio Rev. Code 2929.11 (B)(2): "It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation." In view of the State's evidence at trial which alleged that Petitioner in planning and carrying out the robbery alone, the ability to demonstrate duress or coercion was doubtful, and again the condition of the body of the victim would rule out strong provocation.

The third witness who testified was Dr. Ramoni, a psychiatrist who examined Petitioner for fifty minutes for the purpose of the mitigation hearing. (Report App. at pp. 57-58.) In summary, in the Doctor's opinion, Petitioner was not mentally ill or deficient at the time of his examination (App. at p. 58.) The doctor admitted, however, that Petitioner had had a psychotic episode in March of 1977, one month after the homocide of Georgene Burse, where he overdosed on amphetamines, ran nude out of his home and proceeded to break into several houses. (T. Vol. III, pp. 76-77; App. at pp. 42, 43.) This episode required Petitioner's commitment to a mental institution for a period of three days. (T. Vol. III, pp. 78-79; App. infra at pp. 44, 45.)

The final witness who testified, Dr. Martin Gunter, also a psychiatrist, examined Petitioner and prepared a psychiatric report for the purpose of the mitigation hearing. (Report, App. at pp. 59- 61.) The doctor also agreed that the rampage Petitioner went on in March of 1977 was a psychotic episode and that Petitioner's heavy drinking problem was an important factor in considering whether he was mentally ill. (T. Vol. III, pp. 92-93; App. at pp. 46, 47.) In summary, the doctor's findings were that even though Petitioner had had a psychotic episode, was an anti-social personality, and believed himself to be an inadequate individual, he was not mentally ill or deficient. (App. infra at p. 60.)

At the conclusion of the hearing, the trial court reviewed the evidence presented and held that the Petitioner had not established by a preponderance any mitigating factor under the statute, whereupon the court sentenced Petitioner to death. (T. Vol. III, pp. 113-118; App. infra at pp. 47-53.)

Petitioner filed a motion for new trial on September 11, 1976, which was heard September 23rd. The Petitioner had three grounds for his motion which were: (1) newly discovered evidence; (2) misconduct by the Prosecutor's Office in withholding this from the defense, and (3) that there was insufficient evidence to sustain the jury verdict at the guilt phase of his trial. (T. Vol. III, pp. 120-121.) The Petitioner's motion for new trial was based on the testimony of Robert Muenick. Muenick testified that he had had homosexual relations with the victim's

husband, Richard Burse, while he (Muenick) worked at the florist shop and that Mr. Burse had offered him and others $1500 to kill his wife shortly before her murder. (T. Vol. III, pp. 126-128.) Further, Muenick stated that he had seen Petitioner's brother, Rudy Trivonvich, at the Burse's Florist Shop, appearing to "stake out" the place. (T. Vol. III, p. 192.) Muenick had told this information to representatives of the Akron Police Department during Petitioner's trial while he was being questioned concerning an unrelated criminal charge. (T. Vol III, p. 125.)

The state offered two witnesses in rebuttal, one, Detective Duane Harris of the Akron Police Department, who admitted receiving information from Muenick concerning the Stacey Lane case, (T. Vol. III, pp. 152-153), and Sheriff Deputy Robert Metker who also confirmed Muenick had told him that the victim had offered $1500 to kill his wife (T. Vol. III, p. 166). The trial court, however, denied all the grounds of Petitioner's motion for new trial (T. Vol. III, p. 168).

After being appointed new counsel, Petitioner timely filed his appeal to the Ninth Judicial District Court of Appeals for Summit County, Ohio. The Petitioner raised seventeen assignments of error, the pertinent ones in relation to the questions presented in the petition were:

I "The trial court committed prejudicial error when it refused to allow defendant's counsel to examine the prospective jurors at voir dire upon the question of capital punishment."

II "The trial court committed error at the mitigation hearing in that its findings were contrary to the evidence and that the court, in dealing with the question of insanity, did not deal with the question of mental deficiency, as called for in R.C. Section 2929.04(B)(3)."

III "The trial court committed prejudicial error in sentencing the defendant to the death penalty in that:

(A) Prejudicial error was committed in convicting and sentencing defendant pursuant to Ohio Revised Code Section 2903.01, 2929.03 and 2929.04 as such sections unconstitutionally permit arbitrary imposition of the death penalty, such arbitrary procedures being held in violation of the United States Constitution in Furman v. Georgia; and

"(B) Prejudicial error was committed in sentencing the defendant to the death penalty as imposed by Ohio Revised Code, Section 2929.04 as said section constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution and Article I, Section 9 of the Ohio Constitution."

The Ninth District Court of Appeals found no error and on April 28, 1976, affirmed Petitioner's conviction and sentence to death (App. infra at p. 7.)

After his appellate counsel withdrew, Petitioner was appointed new counsel who pursuant to Ohio Const. Art. IV § 2 Cl. (B)(2), appealed his case to the Supreme Court of Ohio presenting seventeen proposition of law, the following being the relevant ones for this petition:

I "It is prejudicial error and a violation of the due process clause of the Fourteenth Amendment requiring a fair and impartial trial for a trial court to refuse to allow a defendant's counsel to examine the prospective jurors at voir dire regarding the question of capital punishment.

II It is prejudicial error and a violation of the due process clause of the Fourteenth Amendment requiring a fair and impartial trial for a trial court at a mitigation hearing not to deal with the question of mental deficiency as called for in R.C. Section 2929.04 B 3), if the evidence so warrants.

III A trial court commits prejudicial error in sentencing a defendant to the death penalty pursuant to sections 2903.01, 2929.03 and 2929.04 of the Ohio Revised Code, as such sections are unconstitutional in that they permit the arbitrary imposition of the death sentence in vilation of the Eighth and Fourteenth Amendments of the United States Constitution.

The Ohio Supreme Court found no prejudicial error in Petitioner's case and affirmed his conviction and sentence of death on December 30, 1976, in their opinion at 49 Ohio St. 2d 77 (App. infra at pp. 1-6.)

The Petitioner, timely filed an application for extension to file his petition before this honorable court. The extension was granted by the honorable Justice Stewart allowing Petitioner until May 28, 1977, to file his petition. Petitioner's sentence of Death has been stayed by the Ohio Supreme Court pending this petition for Certiorari (App. infra at p. 62.) The within action is before this honorable court on a petition for a Writ of Certiorari to the Supreme Court of Ohio.

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REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE OHIO CAPITAL PUNISHMENT STATUTES AND THE SENTENCE OF DEATH GIVEN TO PETITIONER VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

Summary of the Ohio Capital Punishment Statutes

The crime of aggravated murder, Ohio Revised Code, Section 2903.01 is a Capital offense in Ohio, for which the penalty may be life or death. The accused becomes a candidate for the ultimate penalty by being indicted by the Grand Jury for aggravated murder and one of the seven aggravating specifications provided in Ohio Revised Code 2929.04(A). aggravated murder itself falls into two categories, either the purposeful killing of another with "prior calculation and design" or the purposeful killing of another in the course of committing any one of seven other felonies. Thus, the first category is essentially the common law offense of premeditated murder while the latter is essentially felony-murder with the additional requirement that the death be purposefully caused.

After indictment for aggravated murder with specifications, the accused is given the choice of whether first phase or guilt phase of his case shall be heard by the judge or a jury. If the defendant waives his right to a jury trial then his case is heard by a three (3) judge panel. At the conclusion of the trial, if it is a jury trial, the jury is instructed on both aggravated murder and the aggravating specifications. No mention is to be made to the jury of the penalty which may be the consequences of a guilty or not guilty verdict on any charge or specification. (Ohio Revised Code 2929.03 (B)).

The accused remains a candidate for the ultimate penalty if and only if the jury or the three judge panel unanimously returns a verdict of guilty, beyond a reasonable doubt on both aggravated murder and on aggravating specification. If a verdict of guilty on just the charge of

aggravated murder is returned, life imprisonment is imposed.

If a verdict of guilty is returned on both the charge and specification, the jury is discharged and the trial begins the second or mitigation phase of the trial.

Prior to the mitigation hearing, the Court is required to have a pre-sentence investigation and a psychiatric examination of the defendant conducted. Copies of the reports are furnished to the counsel for both the state and defense. (Ohio Revised Code 2929.03 (D)).

The purpose of the mitigation hearing is to determine the presence or absence of mitigating factors listed in Ohio Revised Code 2929.04 (B). Unless the defendant can establish by a preponderance of evidence one of the three mitigating circumstances, the death penalty is mandatory.

The mitigation hearing is tried before the trial judge or if a jury has been waived for the guilt phase of trial, the same three judge panel. At the hearing, the accused can present relevant evidence as to the mitigating factors. The accused can make a statement either under oath or not but if he makes a statement under oath he is subject to cross examination. At the conclusion of the hearing if the trial judge determines that the defendant has not met his burden in establishing one of the three mitigating circumstances, the death penalty is mandatory. In the case of three judge panel, the judges must unanimously agree that the accused has not met his burden of proof to impose the Death Penalty. No findings of fact or conclusion of law are required of the court other than a general finding of no mitigating circumstances.

The Ohio statutes violate Petitioner's Fourteenth Amendment rights by placing the burden of proof upon him with respect to the issue of degree of culpability and resulting punishment.

Ohio Revised Code Section 2929.03 provides that in the event an individual is indicted and convicted for aggravated murder in violation of R.C. 2903.01 and is also indicted and found guilty of one or more of the specifications set forth in Ohio Revised Code 2929.04 (A), the court shall conduct a mitigation hearing to determine whether there exist any of the three mitigating factors set forth in R.C. 2929.04(B). If the court finds that none of the mitigating factors are ". . . established by a preponderance of the evidence, it shall impose sentences of death on the offender. Otherwise it shall impose sentence of life imprisonment on the offender." R.C. 2929.03 (E).

The words of the statute plainly require a defendant to bear the burden of proving by a preponderance of evidence that he is entitled to continue to live by virtue of the existence of one or more of the mitigating factors. See State v. Woods, 48 Ohio St. 2d 127, 135 (1976); Committee Comment to R.C. 2929.03 reprinted in Page's Ohio Revised Code Ann., Title 29 (1975).

Such burden was placed upon defendant in the trial court below (T. Vol. II at 118, App. at 53). Petitioner respectfully submits that the lack of any mitigating factor is, in reality, an element of the crime and that the state's requirement that he prove the existence of a mitigating circumstance by a preponderance of the evidence violates Petitioner's Fourteenth Amendment due process right to require the state to prove each and every element beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970).

Though this aspect of Ohio's death penalty has been raised on three separate occasions, only in State v. Hudson, No. 35562, (Cuy. Cty. C.A. March 17, 1977) was the existence of Mullaney v. Wilbur, supra, and a constitutional issue acknowledged.[2] The State Court of Appeals held that Mullaney was not applicable to Ohio's mitigation hearings because, ". . . the punishment aspect of a case, i.e., sentencing, is clearly distinguishable from the adjudicatory phase. . . ." State v. Hudson, supra, 8-9

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[2] In State v. S. Lockett, C.A. No. 7780 (Summit Cty. C.A., March 3, 1976), 15-16 the pertinent portions of the Court of Appeals decision upon this issue were as follows:

> "Mitigation of sentence has traditionally been a defense function, and the right of leniency has has always been based upon the circumstances of the case and of the circumstances surrounding the defendant himself. . . ."
>
> "We find no conflict with the Constitution or other laws in this statutory provision governing mitigation of sentence pursuant to a separate hearing after guilt has been established. In fact, it provides an added benefit to the convicted felon."

The response of the Ohio Supreme Court was similar:

> "Appellant's argument misconstrues [sic] statutory sentencing procedures. Appellant's argument would have the state prove the proper punishment. Clearly, the introduction of mitigating circumstances has traditionally been a defense function. What appellant fails to perceive is the fact that her guilt has already been proven by the time of the mitigation stage of the proceedings. The mitigating circumstances listed in R.C. 2929.04(B) relate to the lessening of punishment and are far broader than affirmative defenses which the defense must prove in order to excuse or otherwise justify the commission of an offense."
>
> "We find no constitutional conflict in imposing the burden of proving mitigation of punishment on a defendant already adjudged guilty of the commission of a capital offense. This proposition of law is without merit."
>
> State v. S. Lockett, 49 Ohio St. 2d 48, 65-69 (1976).

This analysis might be correct if the facts developed at the mitigation hearing were to be used by the trial judge in exercising discretion to choose between different sentencing alternatives. But Ohio Revised Code Section 2929.03(E) clearly denies the trial judge any sentencing discretion. Rather, if one set of facts exists, then the trial court has no choice but to sentence the defendant to death, while if the other set of circumstances exists, the court must sentence the defendant to life imprisonment.

It is evident, therefore, that those people who commit an aggravated murder under the factual circumstances set forth in the "mitigation" portion of the statute should not receive the death penalty. Similarly, the legislature has decreed that those who commit an aggravated murder in any other circumstance should be executed. The absence of any of the circumstances set forth in the "mitigation" portion of the statute is a condition precedent for execution. As such, it is an element of the offense which the state must prove beyond a reasonable doubt.

Further, it should be noted that there is a virtual identity between the function of the "mitigating" circumstances under Ohio law which would reduce the penalty from death to life imprisonment and the existence of "provocation" in Mullaney which would make the difference between a life sentence, on the one hand, and a sentence ranging from a fine to twenty years imprisonment on the other hand. Indeed, in Mullaney the state--like the Ohio Court of Appeals--attempted to justify placing the burden of proof upon the defendant by arguing that the absence of heat of passion on sudden provocation was not a "fact necessary to constitute the crime" of felonious homicide. Rather, the state of Maine--like the state of Ohio in the case at bar--argued that the question of provocation was considered only on the issue of punishment after it was determined the accused was guilty of at least manslaughter. Mullaney at 697, n. 16.

In rejecting that argument, this Court's reasoning pointed out the infirmity that Petitioner believes exists in Ohio's statutes:

> ". . . if Winship were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect. . . . It would only be necessary to redefine the elements that comprise different crimes, characterizing them as factors that bear solely on the extent of punishment." (Emphasis added.)
> Mullaney v. Wilbur, supra at 697.

Indeed, if the position of the State of Ohio is correct, then there is no constitutional barrier to creating a single homicide offense of murder, punishable by death, and requiring those who commit what are now defined as lesser offenses, e.g., involuntary manslaughter, vehicular homicide, to prove by a preponderance that their punishment should not be death because "mitigating" circumstances exist.

Finally, since this Court held in Mullaney that our system of justice is "concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability," Mullaney at 697, 698,, Petitioner reads Mullaney to apply to the case at bar even if it were assumed, arguendo, that the proof related only to punishment and not to the essential elements of the offense. For:

> "[U]nder this burden of proof, a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result. . . ." (Emphasis added.)
> Mullaney at 703.

Since "death is qualitatively different from a sentence of imprisonment . . ." and "differs more from life imprisonment than a 100-year prison term differs from one of only a year . . .," Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 2992 (1976), it is an intolerable situation when a person in the State of Ohio can be executed when the evidence indicates that it is "as likely as not" that that person deserves to live.

Thus, whether this burden of proof is viewed as being imposed upon the defendant as an "element of the offense," or as a standard for applying

the proper penalty, it is evident that it is being applied to the prejudice of Petitioner's constitutional rights. Because of the failure of the Ohio courts to acknowledge the existence of the constitutional issue and to follow the mandate of this Court's decision in Mullaney v. Wilbur, supra, Petitioner submits that certiorari should be granted in order to properly enforce the supremacy clause of the United States Constitution.

C.

The Ohio death penalty statutes violate Petitioner's Sixth, Eighth and Fourteenth Amendment rights to a trial by a jury of his peers.

Petitioner's Sixth Amendment claim is grounded on his right to require the state to prove each and every element of the offense to a jury of his peers. As set forth more fully above, the Ohio capital punishment system requires that an individual be indicted for and convicted of aggravated murder with specifications and that he be unable to prove that he comes within one or more of the three mitigation categories before he can be sentenced to death. Under Ohio Revised Code section 2929.03(C) the factual determination upon the existence of mitigation is taken out of the hands of the jury and ruled upon by the trial judge or a three-judge panel.

Since the absence of mitigating circumstances is one of the essential elements of the crime of aggravated murder in which the accused is sentenced to death, he is entitled to a trial by jury upon that issue.

Further, even if it is assumed, arguendo, that the factual determination relates to only an aspect of punishment and not an element of the offense, the resolution of the factual question is of such overriding importance that Petitioner is entitled to have that determination made by a jury.[3] Indeed, this Court recognized in Mullaney v. Wilbur, supra, that the determination of facts pertaining to culpability "may be of greater importance than the difference between guilt and innocence for many lesser crimes. . . ." Obviously the resolution of facts which will determine whether the petitioner lives or dies creates such a situation. See Woodson v. North Carolina, supra at 2992. Under this circumstance the right to a jury determination of these crucial facts cannot be constitutionally denied to Petitioner. See United States v. Kramer, 289 F. 2d 909 (2d Cir. 1961).

Without respect to the resolution of his Sixth Amendment claim, Petitioner submits that he has a separate and independent right under the Eighth and Fourteenth Amendments to the Constitution to have the determination of life or death made by a jury. In support of this claim, Petitioner submits the following:

First. The evolving standards of decency that are relfected by the Eighth Amendment can only find proper expression in the context of capital punishment by the existence of jury decision-making upon the issue of life or death. As this Court recognized in Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1967):

> ". . . one of the most important functions any jury can perform in making such a selection [between life imprisonment and capital punishment] is to maintain a

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[3] Mullaney v. Wilbur, 321 U.S. 684, 697, 698 (1975): "the criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability."

> link between contemporary community values and the penal system--a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society." (Citation omitted.) (Emphasis added.)

This conclusion was quoted with approval in Gregg v. Georgia, 428 U.S.153 96 S. Ct. 2909, 2929 (1976). Indeed, in Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 2986 (1976) jury decisions with respect to capital punishment were recognized as one of "the two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society."

Further, in Gregg v. Georgia, supra, the jury was found to be a significant and reliable objective index of contemporary values because it is so directly involved. To allow states to exclude the jury from decision making on the issue of death would be tantamount to abandoning the "evolving standards of decency" test of the Eighth Amendment. A decision that jury participation is not required by the Eighth Amendment would thereby allow the state to effectively undermine the force of that amendment by removing one of the two "crucial indicators" of "evolving standards of decency."

Second. The guarantee of a right to a trial by jury is more than an inestimable right--it also "reflects a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

Though the authors of the Constitution sought to create a democratic government, they nevertheless adopted the Sixth Amendment with the clear intent of protecting "the accused from government oppression." Singer v. United States, 380 U.S. 24, 31 (1965). It was fully contemplated that such oppression might come from the judicial branch as well as from other branches of the government.

As this Court so clearly enunciated in Duncan v. Louisiana, supra at 156:

Until 1974, Ohio exemplified that trend. In 1788 the governing body of the Northwest Territory--of which Ohio was a part--enacted statutes providing for capital punishment upon conviction for treason, murder, and arson where death occurs. Upon conviction the death sentence was mandatory: neither judge nor jury had any discretion in the matter. Ch. VI, Laws Passed in the Terr. of the U.S. North-West of the River Ohio.

Though the offenses for which the death penalty was applicable were changed from time to time, the sentence of death continued to be a mandatory one until April 23, 1898. On that date, the jury was vested with the power to preclude the imposition of the death penalty upon one convicted of murder in the first degree. S.B. No. 504 [To amend section 6808 of the Revised Statutes of Ohio.] 93 Ohio Laws 223. Provisions substantially the same continued until January 1, 1974 when current provisions of the Ohio Revised Code took effect. By its provision, Judges were made the triers of fact upon the issue deciding life and death. Thus, for 186 years, no judge was ever given the power of life and death.

A survey of the applicable statutes in 1948 indicated that four states retained a mandatory death penalty; five states had abolished the death penalty, and in 39 states the choice between death and life imprisonment was left to the jury. Andres v. United States 333 U.S. 740, 767 (1948). At that time no state allowed a judge to participate in making the actual decision as to who was to live and who was to die. Similarly, a survey of the post-Furman death penalty statutes indicates that the overwhelming number of states have continued to honor the right of an accused to have the issue of death or life passed upon by a jury of his peers.[4]

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[4] Other than Ohio, it appears that only four states allow the judge to make the ultimate decision as to life and death. Ariz. Rev. Stat. §13-454 (D); Fla. Stat. Ann. §921; Mont. Rev. Code Ann. §94-5-105(1); Neb. Rev. Stat. §29-2523(2); Ohio Rev. Stat. §2929.0.

> "Those who wrote our constitutions knew from history and experience that it was necessary to protect against . . . judges too responsive to the voice of higher authority."
>
> * * *
>
> ". . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge."

More recently, in Taylor v. Louisiana, 419 U.S. 522, 530 (1975) one of the purposes of the jury system was recognized as being:

> ". . . to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community . . . in preference to professional or perhaps overconditioned or biased response of a judge. . . . (Citation omitted.)

Because of this fear of judicial power; because of "the belief that imposition of the death penalty ought to reflect more of a community consensus than can be marshalled by one man,"[5] and because "[t]he magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society, Marion v. Beto, 434 F. 2d 29, 32 (5th Cir. 1970), decisions upon sentencing an accused to death have historically been reserved to the legislature through mandatory sentence or the jury. Where discretion is to be exercised, jury responsibility for the imposition of the death penalty has been recognized as "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

Thus it is not surprising that when state legislatures turned from mandatory to discretionary sentencing procedures in capital cases, it was the jury, and not the trial judge, in whom the discretion was vested. See McGautha v. California 402 U.S. 183, 200 (1971).

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[5] A.B.A. Standards, Sentencing Alternatives and Procedures, commentary to § 1.1(c) [Approved Draft (1968)].

Ohio's departure from this standard seems to have been occasioned by confusion over the meaning of this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). When the legislature was making a pre-Furman comprehensive revision of the state criminal code the first version of the bill which eventually enacted provided for a jury determination of whether an individual convicted of aggravated murder would live or die.[6] This provision was retained in the substitute bill which was later introduced. Though various amendments were proposed to the substitute bill, no one attempted to vest the trial judge with any responsibility for the decision upon capital punishment.[7] This Court's decision in Furman was rendered after the substitute bill had been passed by the State House of Representatives and was pending before the State Senate Judiciary Committee.[8] It has in its efforts to conform the new provision to what it viewed as the Furman requirement that the Judiciary Committee eliminated the jury from the decision upon capital punishment.[9]

This mistake--though understandable--does not change the underlying difficulty with the statute. Both reason and history suggest that jury decision-making upon the imposition of capital punishment is a value ingrained in both the eighth and fourteenth amendments.

Because the right to a jury trial is so fundamental; because the consequences of the death penalty are so profound; and because Ohio's departure from the time-honor precluding judges from participating in the decision upon whether to impose capital punishment was initiated by confusion engendered by this Court's decision in Furman v. Georgia, supra, review by this Court is merited.

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[6] Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code, 23 Cleve. St. L. Rev. 8, 16 (1974).

[7] Id. at 17-18.

[8] Id. at 18.

[9] Id. at 20.

D

The State has established no compelling state interest which would justify depriving petitioner of his fundamental right to life.

The Massachusetts death penalty was found to be violative of that State's constitution in Commonwealth v. O'Neal, 339 N.E. 2d 676 (Mass. 1975). In his concurring opinion Chief Judge Tauro utilized state due process of law analysis which is equally susceptible to application under the due process clause of the Fourteenth Amendment.

Such analysis highlights one of the major deficiencies of Ohio's attempt to resume the practice of execution and may be summarized as follows:

The Fourteenth Amendment guarantees that states cannot deprive a person of his life without due process of law. Life is the most fundamental right of all: without it an individual would have no rights, fundamental or otherwise. In order to be sustained a statute depriving an individual of a fundamental right must be the least onerous means of furthering a compelling state interest. Thus, a death penalty statute which seeks to deprive a person of his life triggers a strict scrutiny under the compelling state interest and least restrictive means test.

The death penalty serves two principal purposes: deterence of capital crimes by prospective offenders and retribution. Gregg v. Georgia, 428 U.S. 153 , 96 S. Ct. 2909, 2930 (1976) (pluarality). While Petitioner does not dispute that society has a compelling state interest in deterence sufficient to imprison those convicted of murder, the results of empiracle studies have been inconclusive as to the deterent effect of the death penalty vis a vis imprisonment. Gregg v. Georgia, supra. There "is no convincing empiracle evidence either supporting or refuting" the view that the death penalty may not function as a significantly greater deterent force than lesser enalties." Gregg v. Georgia, supra at 2931. (footnote omitted).

Consequently under both the compelling state interest test and the least restrictive means test deterence cannot be utilized to justify the death penalty in lieu of imprisionment. Further, though retribution is not a forbidden objective, it neither requires death in order to be satisfied nor rises to the level of a compelling state interest. Thus, since the State of Ohio is unable to demonstrate any compelling state interest justifying the execution, as opposed to the incarceration of the petitioner, the Ohio statutory scheme is unconstitutional and Petitioner's sentence of execution is void.

E.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MITIGATION FACTORS LISTED IN OHIO CAPITAL PUNISHMENT STATE ARE UNCONSTITUTIONALLY LIMITED IN THAT:

1.

TWO OF THE THREE MITIGATING FACTORS PROVIDED IN THE CAPITAL PUNISHMENT STATUTE FAIL TO PARTICULARIZE CONSIDERATION OF THE RELEVANT ASPECTS OF THE CHARACTER AND RECORD OF EACH CONVICTED DEFENDANT BEFORE THE IMPOSITION UPON HIM OF A SENTENCE OF DEATH.

2.

THE SOLE MITIGATING FACTOR WHICH ADDRESSES THE CHARACTER AND RECORD OF THE ACCUSED IS ILLUSORY AND FAILS TO PROVIDE AN ADEQUATE STANDARD BY WHICH A DEFENDANT CAN EXCULPATE HIMSELF FROM THE DEATH PENALTY.

INTRODUCTION

Last term, this Court struck down the Death Penalty Statutes in North Carolina and Louisiana, since those states had misread this Court's opinion in Furman v. Georgia, 408 U.S. 238 (1972) by attempting to meet the requirements of the Eighth and Fourteenth Amendments by removing all sentencing discretion from the judge and jury. Woodson v. North Carolina, 428 U.S. 280, 300 (1976); Roberts v. Louisiana, 428 U.S. The Ohio Legislature, in enacting the state's death penalty statute, also misread this Court's opinion in Furman, supra, since it is clear that the legislative intent was to retain the death penalty, ". . . but to remove from the judge and jury as much discretion as possible in the punishment determination procedure."[10]

The death penalty statute enacted by the legislature provides only three mitigating factors by which a defendant who has become an

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[10] Lehman and Norris, Some Legislative History and Comments on Ohio's New Criminal Code. 23 Cleve. St. L. Rev. 8, 20 (1974).

automatic candidate for the death penalty[11] can exculpate himself. The Ohio statute appears to be unique in relation to capital punishment statutes already reviewed by this Court last term, since in Ohio the defendant has to establish by the preponderance of evidence,[12] one of the mitigating factors. By comparison to the statutes in Florida,[13] Georgia,[14] and Texas[15] which have passed constitutional scrutiny by this Court, Ohio's mitigation factors are extremely narrow. Thus, the Ohio law does not establish "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death" (Woodson v. North Carolina, supra, at 428 U.S. 303), but for practical purposes is a mandatory death penalty.[16]

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[11] Ohio Revised Code 2929.03(D) provides that if the Defendant fails to establish one of the mitigating circumstances by a preponderance of the evidence the Court "shall impose the Penalty of Death on the offender."

[12] Ohio Revised Code 2929.04(B). The trial judge, in imposing the death penalty in Petitioner's case found that Petitioner had not met his burden of proof. This principle of the defendant's burden of proof at the mitigation hearing was affirmed in the Ohio Supreme Court opinion in State v. Sandra Lockett, 49 Ohio St. 2d 48, 66-67 (1976).

[13] The Florida statute reviewed by this Court provided seven specific mitigating circumstances, four of which are noticeably not present in the Ohio statute, such as the defendant's age, prior record, his role in the offense, and more broadly defined mental and emotional disturbances and impairments. Proffitt v. Florida, 428 U.S. 242, 248 Fn. 6 (1976); see State v. Bayless, 49 Ohio St. 2d 75 at 86-87 (1976) (for comparison of Florida statute with Ohio).

[14] As this Court noted in Gregg v. Georgia, 428 U.S. 158 (1976), the Georgia capital punishment statute allows any mitigating factor provided by law to be presented by the defendant at the sentencing trial, including youth, extent of cooperation with the police, and emotional state at the time of the crime. Gregg, supra, at 428 U.S. 197.

[15] Although the Texas statute did not delineate a mitigating circumstance, this Court recognized by case law that the defendant could present any mitigating factor at his sentencing trial, including age, mental and emotional state, and lack of prior criminal record. Jurek v. Texas, 428 U.S. 262, 273 (1976).

[16] The Ohio Supreme Court has reviewed 20 post-Furman death sentences and reduced none.

1.

TWO OF THE THREE MITIGATING FACTORS PROVIDED IN THE CAPITAL PUNISHMENT STATUTE FAIL TO PARTICULARIZE CONSIDERATION OF THE RELEVANT ASPECTS OF THE CHARACTER AND RECORD OF EACH CONVICTED DEFENDANT BEFORE THE IMPOSITION UPON HIM OF A SENTENCE OF DEATH.

At the mitigation stage of the trial, the death penalty is mandated unless the defendant convicted of aggravated murder with specifications proves one of the following factors by a preponderance of the evidence:

> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.
>
> Ohio Rev. Code 2929.04(B).

On its face, the statute only meets the constitutional requirement of "particularized considerations of relevant aspects of the character and record of each defendant before the imposition upon him of a sentence of death" in criteria three. Woodson v. North Carolina, supra, at 303. As to mitigating factor (1), the conduct of the victim in facilitating his own death, clearly the character and record of the defendant has no relevance.

While the defendant's background is relevant to considering the concepts in mitigating circumstance (2) of duress, coercion[17] and strong

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[17] The issue of duress and coercion has arisen in two cases, State v. Woods, 48 Ohio St. 2d 127 (1976), and State v. Bell, 48 Ohio St. 2d 270 (1976). In Woods, supra, the court gave an admittedly broad definition of duress and coercion in application, however, the court appeared to overlook its own definition. In Woods, the defendant had no prior record, was easily led, and was dominated by others, especially his co-defendant, Reaves, who had planned the actual robbery. Since Woods did not abandon his criminal conduct before the shooting (in which case he would have escaped capital punishment altogether) the court did not reduce his sentence. By the same token, in Bell, supra, the court refused to reduce the defendant's sentence although he was only 16, and also easily led by his adult companion, Hall. Since he had not abandoned his criminal conduct after the crime was committed. Bell, supra, 48 Ohio St. 2d 282. Both these cases are examples of Ohio Supreme Court's refusal to judge "individual culpability" of each defendant instead of reviewing on the basis of the "category of the crime committed." See Roberts v. Louisiana, supra, 428 U.S. at 222.

provocation[18] its application to the class of death penalty candidates has so far been extremely limited and almost non-existent.

2.

THE SOLE MITIGATING FACTOR WHICH ADDRESSES THE CHARACTER AND RECORD OF THE ACCUSED IS ILLUSORY AND FAILS TO PROVIDE AN ADEQUATE STANDARD BY WHICH A DEFENDANT CAN EXCULPATE HIMSELF FROM THE DEATH PENALTY.

The sole mitigating factor which allows the consideration of defendant's background and character is subsection (3) of 2929.04, which allows the defendant to prove that the crime was "primarily the product of" his "psychosis or mental deficiency." Since a "psychotic" offender, in all probability would not be found criminally responsible for his actions, in practice, the consideration of the accused's life and character will turn on the interpretation of "mental deficiency."

The phrase "mental deficiency" in psychiatric terms has been synonomous with mental retardation. The first death penalty case decided by the Ohio Supreme Court, State v. Bayless, 48 Ohio St. 2d 73 (1976) adopted this

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[18] The mitigating factor that "it is unlikely that the offense would have been committed but for the fact that the offender was under . . . strong provocation," Ohio Rev. Code 2929.04(B)(2) has not been an issue in any of the twenty (20) capital cases reviewed by the Ohio Supreme Court. The above section is for all intents and purposes identical to the Ohio Criminal Code definition of voluntary manslaughter:

> "No person while under extreme emotional stress brought on by serious provocation reasonably sufficeient to incite him into using deadly force, shall knowingly cause the death of another." (Emphasis added.)
> Ohio Rev. Code §2903.03

Thus a defendant in Ohio who kills his victim under serious or strong provodation sufficient to raise a reasonable doubt to the jury would be guilty of voluntary manslaughter and would not be subject to the death penalty. Alternatively, if the defendant was unable to convince the trier of fact at trial that he acted under strong provocation sufficient to raise even a reasonable doubt, it is doubtful if he could convince the trial judge by a preponderance of the evidence at his mitigation hearing. Therefore the availability of this mitigating factor is at best speculative.

interpretation.[19] In light of this definition the Supreme Court in reviewing the death sentences of twenty condemned defendants has found none which fit the category of mentally deficient, no matter how youthful,[20] uneducated,[21] or mentally retarded.[22] Thus, this mitigating factor is reserved solely for the moron or imbecile, who can demonstrate the crime was the primary product of that condition.

After the Bayless, supra, case, possibly in concern over the scrutiny this Honorable Court would place on the narrowness of the statutory mitigating factors, the Supreme Court enlarged its definition of "mental deficiency." The new interpretation of "mental deficiency" became:

> "Any mental state or incapacity may be considered in light of all the circumstances and including the nature of the crime itself . . . ."
> State v. Black, 48 Ohio St. 2d 262, 269 (1976).[23]

This reinterpretation, Petitioner submits, is cosmetic since no defendant interviewed by the court has fit within the confines of the definition.

The accused in Ohio convicted of aggravated murder with specifications have the burden of proof in establishing mitigating factors such as

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[19] Justice Stern, speaking for the court, held:

> "Mental deficiency is consistently defined to mean low or defective state of intelligence."
> State v. Bayless, supra at 95-96.

[20] The Supreme Court has held that youth is a primary factor going to mental deficiency. State v. Bell, 48 Ohio St. 2d 270 (1977). Invariably the Court has upheld death sentences to minors. State v. Bell, supra (defendant was 17); State v. Harris, 48 Ohio St. 2d 351 (1976) (defendant was 17, with an IQ of 72).

[21] The Court has held that ". . . [E]ducational deficiency does not equate with mental deficiency. State v. Edwards, 49 Ohio St. 2d 31, 47 (1976) (defendant was borderline mentally retarded with an IQ of 72).

[22] State v. Royster, 48 Ohio St. 2d 381 (1970) (defendant had "an IQ of 75 in 1962; 61 in 1966, and 54 in 1968." Id. at 389). See also State v. Edwards, supra (defendant had an IQ of 76); State v. Harris, supra (defendant had an IQ of 72.

[23] Interestingly, three justices of the Supreme Court (J. Stern, Celebreeze, and W. Brown) while concurring in the judgment in Black, supra, did not concur in the interpretation of "mentally deficient," evidencing a division of the court as to the meaning of mental deficient if any.

"mental deficiency" but as of yet such factors have not been adequately explained by the highest court in the state. Surely a defendant facing a death sentence is entitled to the same constitutional due process rights of adequate notice and definitive standards in statutory wording as an accused faced with any type of criminal charges, to safeguard against "arbitrary and discriminatory application" of criminal statutes." Graywood v. City of Rockford, 408 U.S. 104 at 108-109 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971). Based on the conscious failure of the Ohio Supreme Court to provide a standard for mitigating circumstances, the Ohio death penalty statute is inherently vague and the ability of the accused to avoid the death penalty is illusory.

F.

The Ohio Courts have failed to properly review Ohio's death penalty cases.

> "It is now clear that the sentencing process as well as the trial itself, must satisfy the requirements of the Due Process Clause."
> Gardner v. Florida, U.S. , 20 Cr. L. 3083, 3085 (March 22, 1977).

Plenary appellate review of death sentences serves as an "important additional safeguard against arbitrariness and caprice." Gregg v. Gregg, supra, at 2937. The cases of Gregg, Proffitt, Jurek, Woodson, and Roberts have been held to require "meaningful appellate review designed to determine whether the imposition of the death penalty is warranted in any given cases." Jackson v. Mississippi, No. 49, 178, p. 21 (Mississippi Supr. Ct. 1976), 337 So. 2d 1242, 1255 (Miss. 1976).

In Ohio a person sentenced to death has an appeal as of right to the Ohio Supreme Court. Section 2, Article IV, Ohio Constitution. But, as demonstrated below, the system of appellate review in the state of Ohio cannot pass constitutional muster.

First. There must be an adequate trial record in order to allow for effective review. Even in civil litigation the parties are assured of receiving findings of fact and conclusions of law. Ohio Civil Rule 52. And in the context of a criminal proceeding, it has been held that trial courts should make specific findings of fact to support rulings upon suppression motions, United States v. Gusan, 549 F. 2d 15 (7th Cir. 1977); that such findings are always advisable with respect to the reasons for rendering a particular sentence, United States v. Carden, 428 F. 2d 1116, 1118 (8th Cir. 1970); and that in state speedy trial proceedings "sufficient facts and reasons be set forth in the record to support the court's decision." State v. Messenger, 49 Ohio App. 2d 341 (1976). Indeed, as was said in Gardner v. Florida, ___ U.S. ___, 20 Cr. L. 3083 (March 22, 1977):

". . . Since the State must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, ___ U.S. ___, No. 75-506 (July 2, 1976) Slip op., at 7-9, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia." (Footnote omitted.)

But the Ohio trial courts continuously fail to make detailed findings necessary for effective appellate review. In Edwards, supra,[25] for example, the April 1975 Journal Entry speaks to this issue only to this extent:

"The Court having heard testimony in the matter presented on April 29, 1975, and upon due consideration hereof, finds that there are no mitigating circumstances present."

Similarly, the transcript of the mitigation hearing contains only the Court's ultimate conclusions and nothing that can be said to even approach specific findings of fact.[24] In an effort to demonstrate to the Court that this

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[24] That portion of the transcript reads as follows:

COURT: The Court has reviewed all the testimony pertaining to mitigation; has reviewed the reports as well as the statement made by the witnesses that appeared on his behalf; the Court has read the Pre-Sentence Report. The Court, in reviewing the case finds that the preponderance of the evidence does not in this particular case, as far as mitigation is concerned the Court found that the aggravated murder of Joseph Eschack was not the product of the offender's psychosis or mental deficiency, and therefore finds no mitigation to consider in this particular case.

Needless to say, the Court was affected by the background of this boy, or this man I should say, living under the conditions that he had to live and responding the way he responded through all the conditions and the Court was sympathetic in that regard, but the Court in fair conscience could not find that there was mitigation in this case.

The Court appreciates the fact that a lot of his friends who worked with him throughout the years came and spoke on his behalf, but again the mitigation, (continued p.36)

[25] State v. Edwards, 49 Ohio St. 2d 31 (1976).

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deficiency in the articulation of facts is not a problem limited only to Petitioner, there is set forth in the Appendix relevant journal entries and transcript pages from State v. Hines, No. 5302 (CP Ashland County) and State v. Perryman, No. 75-3-436 (CP Summit County).

In matters as important as these a defendant has a right to the specific finding of facts that underlie the Court's ultimate resolution of the question of mitigation. Any lesser standard violates due process.

Second. The Ohio Supreme Court itself has shown an indifferent regard for integrity of the record upon which review predicated. In State v. Woods, 48 Ohio St. 2d 127, 134 n. 3 (1976) the Court noted:

> "One difficulty in considering the claims for mitigation in this case is that the pre-sentence report required to be made by statute does not appear in the record. This court bears a special responsibility in capital cases to assure that the ultimate penalty of death be imposed fairly and consistently, and that responsibility requires that we independently evaluate the evidence of aggravation and mitigation upon which each death sentence is based. For that reason, pre-sentence reports and other information relevant to the appropriateness of the death sentence should properly be included in the record of each case brought to this court as a matter of right because the appellant's sentence of death has been affirmed by the Court of Appeals."

In spite of this deficiency and in spite of its power to supplement the record by ordering the report to be deposited with the Court, e.g. State v. Roberts, 50 Ohio App. 2d 237, 251 (1977), the Ohio Supreme Court proceeded to analyze the merits and affirm the conviction without the availability of the reports.

Third. Edwards, supra, provides another example, the Court below has demonstrated that it did not examine the record with the type of serious scrutiny that should be given to a case which may result in the death.

As set forth more fully, beginning at page 36, the Ohio Supreme Court erroneously concluded that a psychiatric evaluation ordered by

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> (continued) the preponderance was not there and the Court felt that you, Mr. Chuparkoff, have done an excellent job in presenting his side of the case, both during the trial and through the mitigation. The Court knows the burden that was placed upon you, as well as the State.
>
> Now, it's my duty to sentence Mr. Edwards.

the trial court was for purposes of determining competency when a close examination of the record would have clearly revealed that the psychiatrist was asked to, and did in fact, examine Petitioner with respect to one of the mitigating factors which, if established, would preclude imposition of the death penalty.

The Court made a similar mistake with regard to the identity of one Mack Newberry. In attempting to justify the decision of the trial court in allowing officer Ronald Davis to testify for the state, even though his name did not appear on the witness list, the Ohio Supreme Court stated:

> "Although the witness list was incomplete, it did include the name of Mack Newberry, the partner of Ronald Davis, who accompanied him on his tour of duty. It was the intention of the state to call Newberry as its first witness, but a heart attack the night before trial precluded his appearance, and Davis was called in his stead."
>
> State v. Edwards, 49 Ohio St. 2d 31, 42 (1976).

The transcript clearly shows that Newberry was an individual who lived in the neighborhood where the victim died (T. pp. 293, 341). Contrary to the conclusion of the court below, Mr. Newberry was a black male, 77 years of age, who was neither a policeman or the partner of officer Ronald Davis (App.

Fourth. Of equal concern is the likelihood that the court below did not devote any serious attention to the briefs prepared by counsel. The mistake with respect to Mr. Newberry was also one which the Court of Appeals had initially made. Upon appeal to the Ohio Supreme Court, counsel for the Petitioner pointed this error out in his brief and cited transcript pages which were relevant to that, explaining to the Court that Mr. Newberry was not a police officer. In spite of this effort, the error was republished in the Ohio Supreme Court's opinion.

Fifth. In State v. Bayless, 48 Ohio St. 2d 73, 86 (1976) the court below indicated that it had:

> ". . . a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." (Emphasis added.)

See also State v. Woods, 48 Ohio St. 2d 127, 134 n. 3 (1976) and State v. Strodes, 48 Ohio St. 2d 113, 117 (1976).

In spite of this commitment to "independent review" it is worthy of note that as of this date the lower court has not reversed a single case nor reduced a single sentence as a result of its independent review.

Further, it is evident that by "independent" review the Ohio Court does not mean a plenary weighing of the sentencing factors as is done in Florida, E.g., Swan v. State, 322 So. 2d 485, 489 (Fla. 1975). Indeed, when Petitioner sought to have that court consider the evidence upon the issue of mental deficiency, the Court responded thusly:

> "In criminal appeals, this court will not retry issues of fact. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered. From the evidence before it, the trial court had more than sufficient evidence to support its judgment. (Emphasis added.) (Citation omitted.)

Since this is the same standard that is applied to all criminal cases, the Court's "independent review" seems to be illusory.

Other deficiencies in the review Ohio accords to those sentenced to death are set forth above in division "E" which discusses the Court's treatment of the mitigating factors. Further examples can be expected to be presented on an individual basis as the remaining petitions for certiorari are filed. But Petitioner believes that the foregoing is sufficient to indicate that the Ohio Courts had not taken their duty to review capital cases as seriously as they are required to.

Because the Ohio Courts have not adhered to the high standards of appellate review as Florida, Georgia, and Texas have, the judgment of this Honorable Court is necessary to set forth the constitutional boundaries within which state appellate courts must function when reviewing capital cases.

G.

Ohio capital sentencing procedures impermissibly penalize exercise of the right to trial by jury.

Petitioner submits that the Ohio statutory scheme improperly and unnecessarily penalized the exercise of this right to trial by jury and concurs fully in the apt argument of the law upon this issue submitted by the petitioner in Carl L. Bayless v. State of Ohio, Petition for Writ of Certiorari (pending):

"United States v. Jackson, 390 U.S. 570 (1968) stands for the proposition that the right to a jury trial is unconstitutionally diminished when separate and more lenient sentencing standards are established for cases in which the right is waived. See also, Funicello v. New Jersey, 403 U.S. 948 (1911) (per curiam); Atkinson v. North Carolina, 403 U.S. 948 (1971) (per curiam). This is so because such a scheme "needlessly encourages" the waiver of the right to have one's guilt determined by a jury. Id. at 588. Yet, under Ohio capital sentencing procedures the defendant who elects to be tried by a jury must forego the benefit of having his fate determined by a panel of judges rather than by a single judge. This benefit is, of course, considerable:

> 'A multi-judge court offers an opportunity for disagreement wholly lacking in a single judge. With such an issue as the death penalty involved, the possibility and vailability of disagreement are advantages that cannot be disregarded. The fact that a single judge may be reluctant to assume the awesome solitary choice between life and death cannot weigh in the balance. Judges are presumed to have the fortitude to carry out their responsibilities.'

Rainsburger v. Foglaine, 380 F. 2d 783, 785 (C.A. 9, 1967). And, since there is no justification for conferring the benefit upon some, but not all capital defendants, it can not legitimately serve as an inducement to forego trial by a jury of one's peers."

H.

The Ohio statutory scheme for capital punishment contains a substantial risk that capital punishment will be inflicted in an arbitrary and capricious manner.

Initially, Petitioner contends that the Ohio statutory scheme is arbitrary and capricious. This is so because the legislature has provided that a murder which results from prior calculation and design is aggravated murder without any specification and consequently without any risk of receiving the death penalty. Compare Ohio Revised Code sections 2903.01(A) and 2929.04. At the same time, the Ohio Legislature mandated that those whose actions take the life of another during the commission of a felony (similar to the common law murder-felony rule) have committed aggravated murder with a specification and consequently may be subjected to the death penalty unless mitigating circumstances are proven by a preponderance. Ohio Revised Code sections 2903.01(B) and 2929.04(A)(7). The Ohio statutes thereby operate to preclude from capital punishment the perpetrator of the most premeditated and heinous murder, and at the same time to create a presumption of capital punishment for even the most accidental and unintended death which occurs during the commission of a felony. Similarly, the Ohio statutes dealing with the death penalty for felony-murder admit to no particularized consideration of the culpability of the individual when more than one party is involved. It blindly mandates the death penalty for principals and aider and abettor alike, without any regard to their actual knowledge, participation or culpability in the death. E.g., State v. Lockett, 49 Ohio St. 2d 48 (1976).

Petitioner submits that the Ohio Legislature has not merely allowed, but rather had mandated the use of capital punishment in an arbitrary and capricious manner.

Further, the statutory system is suspect of being applied in an arbitrary and capricious manner.

First. In Ohio, as in most states, the prosecutor has tremendous discretion in determining both the ultimate charge against the accused and in plea bargaining. Obviously, such discretion encompasses the opportunity for both good faith mistakes and for abuse. The possible constitutional problem with such a system were briefed before this Court in the last two terms. See Fowler v. North Carolina, No. 73-7031, Brief for Petitioner, pp. 45-61; Woodson v. North Carolina, No. 75-5491, Brief for Petitioners, pp. 28-32; Gregg v. Georgia, No. 74-6257, Brief for Petitioner, pp. 18-20; Jurek v. Texas, No. 75-5394, Brief for Petitioner, pp. 29-40.

Though the existence of such discretion alone is not enough to demonstrate a constitutional infirmity, e.g., Gregg v. Georgia, supra, at 2937, Petitioner submits that if impirical data were available which demonstrate that through the exercise of such discretion or its abuse, those individuals who were given the death penalty were selected in an irrational, arbitrary, or capricious manner, then the death penalty of this state would be unconstitutional under this Court's decision in Furman v. Georgia, supra.

The Ohio Department of Mental Health and Mental Retardation keeps detailed statistics upon each Ohio criminal case which traces the history of each case from indictment through disposition and contains other relevant information with respect to age, sex, and race of each defendant. A copy of the form used to collect this data is reproduced in the Appendix at page Though such documents are Public Records to which Petitioner has an absolute right of access. See Ohio Revised Code Section 149.43, as of the date of the preparation of this petition he has been unable to convince that

agency of the state to allow him access to such information. Nevertheless, Petitioner will obtain that data either by agreement or mandamus. Based upon partial statistics that Petitioner has gathered through the cooperation of the courts in sixty of Ohio's eighty-eight counties, Petitioner submits, upon information and belief, that the more complete and reliable statistics in the possession of the State of Ohio would be relevant to whether or not Ohio's statutory system of capital punishment is being utilized in an arbitrary and capricious fashion.

Second. There have been instances where a death sentence has not been imposed because a mitigating circumstance was found. Given the illusory nature of the mitigation portions of the Ohio statute as discussed above, this raises the question of whether judges in the state of Ohio are acting in such a manner as to make the death penalty in Ohio one that is arbitrary and capriciously imposed. This can be easily ascertained by reference to the transcripts once those mitigated cases are identified through the information in the possession of the Ohio Department of Mental Health.

Accordingly, Petitioner asks that this Court consider the fact that the Ohio statute itself mandates arbitrary and capricious infliction of death and to evaluate statistical data concerning Ohio's current statutory scheme in order to determine whether that penalty is being applied in an arbitrary or capricious manner.

II

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S REFUSAL TO ALLOW PETITIONER TO VOIR DIRE HIS POTENTIAL JURORS WITH RESPECT TO THEIR VIEWS UPON CAPITAL PUNISHMENT DENIED PETITIONER THE OPPORTUNITY TO INTELLIGENTLY EXERCISE HIS PEREMPTORY CHALLENGES AND THEREBY VIOLATED HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

As is the custom in the State of Ohio, the bulk of the voir dire of the jurors at Petitioner's trial was conducted by counsel. Prior to the commencement of voir dire counsel for Petitioner indicated that he wished to question the potential jurors upon the issue of capital punishment. This request was denied by the Court. (T. Vol. I p. 58-59, App. 24.25) Petitioner believed that his was constitutional error, and took the matter first to the Ohio Court of Appeals and then to the Ohio Supreme Court.

The Ohio Supreme Court's treatment of this issue has been anamalous, to say the least. In State v. Bayless, 48 Ohio St. 2d 87 (1976) the Court upheld voir dire upon capital punishment, over the defendant's objection, under the theory that it would bring to light those potential jurors whose beliefs were such that even though they played no role in the punishment phase of the trial, they could not follow their oath. Bayless at 88. The Court concluded:

> . . .that the attitude toward captial punishment held by many individuals, both opposed and in favor, presents real and serious problems for the impanelling of a fair and impartial jury. Despite the fact that capital case jurors are to consider only guilt, and that sentencing is left to the trial judge, we see in the record of this voir dire that a prospective juror's opinion on capital punishment often does prevent him from impartially applying the law, as it is given in the Court's instructions, to the facts as he finds them.
> State v. Bayless, supra at 89. (emphasis added)

Subsequently, in State v. Lockett, 49 Ohio St. 2d 48, 56 (1976) the Court noted:

> ". . .the attitudes held by many individuals concerning capital punishment, both opposed and in favor, would prevent them from fairly and impartially applying the law, as given in the Court's instructions, to the facts as they are presented. An inquiry into the opinions, and attitudes of prospective veniremen is not only proper but essential, in order to expose prejudices and bias that might prevent a fair and impartial adjudication of guilt or innocence." (emphasis added)

In Petitioner's case the Ohio Supreme Court nevertheless found no error.[26] State v. Edwards, supra. Rather, it held that the inquiry that it had labeled "essential" in Lockett could be substituted for by a general jury instruction which would tell the jury in detail that it must abide by the Court's jury instructions. Cf. State v. Bayless, supra at 89. Petitioner respectfully submits that the Constitution of the United States requires a different result.

Under the Sixth and Fourteenth Amendments to the United States Constitution, Petitioner is guaranteed the right, in a criminal proceeding, to have his case heard before an impartial jury. It has long been said that the peremptory challenge is an integral part of this right. See Lewis v. United States, 146 U.S. 370, 376 (1892). Indeed this Court has stated that the peremptory challenge is "one of the most important of the rights secured to the accused." Pointer v. United States, 151 U.S. 396, 408 (1894). Further, in discussing the history of the peremptory challenge and the salutary purpose which it serves, the Court in Swain v. Alabama. 380 U.S. 202, 219 (1965), stated that: "the denial or impairment of the right is reversible error without a showing of prejudice. . . citations omitted). Obviously inorder for the right to be meaningful a defendant must have an opportunity to gain sufficient information about the prospective jurors so that he may intelligently exercise his peremptory challenges. E.g. United States v. Jackson, 542 F. 2d 403, 413 (7th Cir. 1976); United States v. Segal, 534 F. 2d 578, 581, (3rd Cir. 1976).

While this Court held nine years ago that there was insufficient empiracle evidence from which it could be concluded that the exclusion of jurors opposed to capital punishment creates an unrepresentative jury and increases the risk of conviction, Witherspoon v. Illinois, 391 U.S. 510, 516-519 (1968), there nevertheless exists a substantial body of authority for the proposition that jurors who hold strong beliefs in captial punishment are more prone to return a conviction than those jurors who feel other-

---

[26] See State v. Anderson, 30 Ohio St. 2d 66, (1972) where the Ohio Supreme Court reversed because of an inadequate Witherspoon voir dire, holding: "This former right (peremptory challenge) is to be exerised at their discretion and free from any limitation or restriction. Any rule of law which denies a litigant reasonable latitude in the examination of prospective jurors as to their qualifications in order to enable him to exercise such peremptory challenges judiciously and intelligently, deprives him of a substantial right."

otherwise. E.g., White, The Constitutional Invadity of Convictions Imposed By Death-Qualified Juries, 58 Cornel L. Rev. 1176 (1973); Jurow, New Data on the Effect of A 'Death Qualified' Jury on the Guilt Determination Process, 84 Harvard L. Rev. 567 (1971); Bronson, On the Conviction Proneness and Representativeness of the Death Qualified Jury: An Empiracle Study of Colorado Veniremen, 42 U. of Colorado L. Rev. 1 (1970); Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Tex. L. Rev. 545, 547 (1961).

This data may not be sufficient to compel a judicial conclusion that juries so constitued are unrepresentative, but it is sufficient to allow an accused to make a reasoned, good faith decision that jurors who hold strong beliefs in capital punishment have a perspective on life which is inimical to his right to a fair trial and that consequently he would be well advised to exercise his peremptory challenges to remove such persons from his jury. Such challenges could not be intelligently exercised if a defendant was not allowed to discover which, if any, of his potential jurors entertained such beliefs.[27] Hence, the restrictions the state trial court placed upon voir dire impaired Petitioner's right to peremtorily challenge potential members of his jury and thereby denied him his rights under the Sixth and Fourteenth amendments.

---

[27] The Court held that Witherspoon v. Illinois, 391 U.S. 510, (1968) was not applicable because in the case at bar the jury did not participate in the sentencing process. Accord: State v. Strub, 48 Ohio App. 2d 57 (1975). But see Davis v. Georgia, U.S. , 97 S. Ct. 399 (1976); Street v. Georgia, U.S. , 97 S. Ct. 520 (197).

CONCLUSION

Last term, this Court reviewed the capital-sentencing systems in five states under the scrutiny of the Eighth and Fourteenth Amendments. This Court held that the determination of whether a particular state has retained the death penalty consistent with the Constitution is made on a state-by-state basis. See Gregg, supra, at 428 U.S. 195. Based upon the questions presented in regard to the constitutionality of Ohio's death penalty statute, as well as the other constitutional questions set forth, Petitioner would pray that his petition for a writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Petition for a Writ of Certiorari and the Appendix thereto to counsel for the Respondent, Mr. Stephen M. Gabalac, Summit County Prosecutor, City-County Safety Building, Akron, Ohio 44308 on this 27th day of May 1977.

Robert J. Boyle

Attorney for Petitioner

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Supreme Court, U. S.
FILED
MAY 28 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

76-6838

No._____

STACEY LANE, Petitioner

-vs-

STATE OF OHIO, Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO OHIO SUPREME COURT

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I N D E X

Note: Pages 1 through 6 is the Opinion of the Court in State v. Lane, 49 Ohio St.2d (1976), and has not been reproduced here.

CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Appendix to Petition for a Writ of Certiorari and the Appendix thereto to counsel for the Respondent, Mr. Stephen M. Gabalac, Summit County Prosecutor, City-County Safety Building, Akron, Ohio 44308 on this 27th day of May 1977.

Richard L. Ayers

Attorney for Petitioner

APPENDIX

STATE OF OHIO)
) ss:
SUMMIT COUNTY)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
(January Term, 1976).

STATE OF OHIO,)
)
Plaintiff-Appellee)
)
v.)
)
STACEY LANE)
)
Defendant-Appellant)

C. A. No. 7924

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS OF SUMMIT COUNTY, OHIO CASE NO. 75 5 601

DECISION AND JOURNAL ENTRY

Dated: April 28, 1976

This cause was heard April 5, 1976, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

DOYLE, J.

This is an appeal from the judgment of the Court of Common Pleas finding defendant, Stacey Lane, guilty of aggravated robbery and aggravated murder. On the aggravated murder charge, the jury further found the existence of two aggravating circumstances; (1) the murder was committed to escape detection, apprehension, trial or punishment; and

-30-

(2) it was committed while the defendant was committing, attempting to commit, or fleeing immediately after the commission or attempted commission of an aggravated robbery.

The jury returned the verdicts on July 21, 1975. On September 11, 1975, a mitigation hearing was held wherein the court found no mitigating circumstances. Sentences were then pronounced by the trial judge, seven to twenty-five years for the aggravated robbery and death as punishment for the aggravated murder.

On September 23, 1975, after a hearing thereon, defendant's motion for a new trial was denied.

We affirm.

Defendant's convictions arose from the robbery and killing of Georgene Burse, proprietor of the Borocki & Burse Florist Shop in Coventry Township, on February 28, 1975, on the premises of the florist shop.

The evidence reveals that on that day defendant told several relatives he planned to rob the florist shop; that he ascertained, from a half-brother (who had been employed by the shop at one time) and an employee of the shop, whether there would be weapons or money at the Burse residence next door and what times it would be likely that no one but the victim would be in the shop.

The defendant went to the shop twice. The first time

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he did not carry out his plan because people were in the shop. On the second occasion, about 5:30 P.M., the defendant entered the shop and confronted the victim with a gun. When she resisted, he clubbed her on the side of the head and then fired six shots into her body.

Later that evening the defendant was seen counting money taken from the decedent's purse and from a cashbox belonging to the shop nearby. He was also seen looking through several credit cards belonging to Georgene Burse.

Defendant appeals, alleging 17 assignments of error.

Assignment of Error No. 1

> "The trial court committed prejudicial error when it refused to allow defendant's counsel to examine the prospective jurors at voir dire upon the question of capital punishment."

This court has previously held that the State may question prospective jurors regarding their opinion of the death penalty. State v. Bayless, Summit No. 7513 (Feb. 5, 1975). We are unimpressed with defendant's contention that the requirements of an impartial jury demand that defense counsel be accorded the same privilege. A juror whose opposition to the death penalty prevents him from returning a verdict of guilty is clearly subject to a challenge for cause because of his inability to follow the law as given, divorced from personal feelings. Therefore, the State may

examine prospective jurors concerning the death penalty. Reversing the situation, however, can it be said that a juror's admission that he is not opposed to the death penalty raises a challenge for cause in the defense? This conclusion is patently wrong.

The cases cited by defendant stand only for the proposition that a prospective juror is the proper subject of a challenge for cause where he is so opposed to the death penalty that he cannot render a verdict of guilt. Thus, if any prejudice resulted from the trial judge's refusal to permit examination on the death penalty, such prejudice inured wholly to the detriment of the State. This assignment is overruled.

Assignments of Error Nos. 2 and 3

> "The trial court committed error in excusing twelve jurors who were not under oath.
>
> "The trial court committed error by allowing five 'joint peremptory challenges' in addition to those permitted by statute, in contravention to the statutory procedure mandated therein."

Defendant cannot complain about a procedure which he actively endorsed at trial. See, State v. Woodards, 6 Ohio St. 2d 14 (1966); See also, State v. Lancaster, 25 Ohio St. 2d 83 (1971). Assignments two and three are overruled.

Assignment of Error No. 4

"The trial court committed error by excusing jurors from the jury selection panel, contrary to the provisions of law and without sufficient cause therefor."

In each of the two incidents cited by defendant, the court properly sustained a challenge for cause when the prospective jurors clearly demonstrated, after lengthy questioning, that they could not be fair and impartial jurors and could not follow the law as given. See, R.C. 2313.42(J). Moreover, as to juror Yannuzzo, defense counsel specifically stated there was no objection to the sustained challenge. This assignment is rejected.

Assignment of Error No. 5

"The trial court committed prejudicial error by allowing to be brought to the jury's attention, by way of references made during the State's opening statement, evidentiary statements which were not to be proved and were in fact not proved by the State."

We find nothing prejudicial in the Prosecutor's opening statements. However, had counsel felt the prosecutor was exceeding the bounds of permissible opening, objection should have been lodged forthwith. With respect to the prosecutor's remarks concerning an alleged grudge, the inconsistency between allegation and testimony is not so egregious as to require a reversal. See, Makley v. State, 49 Ohio App. 359,

379 (1934). Furthermore, in his closing argument, defense counsel apprised the jury of this inconsistency, thus using it to defendant's maximum advantage.

The record indicates that the prosecutor's remarks about a defense alibi came after a lengthy conference between the trial judge and counsel for both sides. It was then agreed by all that the defendant would be allowed to introduce evidence in the nature of an alibi, notwithstanding failure to give the prescribed notice thereof. Defendant's counsel specifically stated that if the court should so decide, the defense would not object to the prosecutor's examination of the jurors on voir dire as to how they would receive evidence of an alibi. Accordingly, we overrule this assignment.

Assignment of Error No. 6

> "The trial court committed prejudicial error by allowing into evidence, for the jury's consideration, reference made to defendant's past criminal record, by way of testimony of a key state witness and by allowing the State to speak thereof during its closing argument."

No objection was raised below to either the answer of Richard Strum or to the remark made by the prosecutor in closing argument. Consequently, any objection was waived. State v. Lancaster, supra. We find that the making of those statements in the presence of the jury was harmless error

beyond a reasonable doubt. Crim. R. 52(A). This assignment is overruled.

Assignment of Error No. 7

"The trial court committed prejudicial error in allowing inflammatory and irrelevant photographic slides of the victim to be admitted into evidence."

Whatever the rule in other jurisdictions cited by defendant, it is well settled in Ohio that the determination of the admissibility of photographs, including those of an autopsy, into evidence is a matter within the sound discretion of the trial court. See, e.g. State v. Middaugh, Summit No. 7787 (Nov. 26, 1975). The mere fact that a photograph is gruesome or horrendous does not render it inadmissible where the court feels it would be useful to the jury. State v. Woodards, supra. The photographs here were relevant and useful to the jury in understanding the testimony of the Coroner (State's Exhibits 11 and 12), as well as that of Deputy Sheriff Morris (State's Exhibits 5, 6, 7, 8, 9, and 10). Therefore, this assignment is overruled.

Assignment of Error No. 8

"The trial court committed prejudicial error by allowing into evidence testimony regarding a telephone conversation between the victim and the witness."

As testimony concerning the telephone call was not introduced in order to prove the veracity of statements made by the decedent, defendant's assertion that such testimony constituted inadmissible hearsay indicates a misunderstanding of the hearsay rule. See, 21 O. Jur. 2d Evidence §283 et seq. What the decedent said is not at issue. Wayne Burse testified only as to what he heard, the voice of his aunt, from which testimony the jury might have reasonably inferred that the decedent was alive at the time the witness said he received the calls. This assignment is, therefore, overruled.

Assignment of Error No. 9

"The trial court committed prejudical error by failing to adequately charge the jury with regards to circumstantial evidence."

No request for the instruction, the omission of which defendant now claims was error, was ever made of the trial judge. Moreover, defendant expressed satisfaction with the charge as given. Crim. R. 30. The assignment is overruled.

Assignment of Error No. 10

"The trial court committed error at the mitigation hearing in that its findings were contrary to the evidence and that the court, in dealing with the question of insanity, did not deal with the question of mental deficiency, as called for in R.C. Section 2929.04(B)(3)."

We find that the trial court properly dealt with the question of mental deficiency and that the court's finding is supported by evidence adduced at the hearing. See, Transcript, Vol. III, pp. 48, 82 and 97. See also, 3 O. Jur. 2d Appellate Review §820. This assignment is overruled.

Assignment of Error No. 11

> "The trial court committed prejudicial error when it overruled defendant's motion for judgment of acquittal, and the jury verdict was in error, because the State failed to prove a case against defendant beyond a reasonable doubt, and therefore the guilty verdict rendered was clearly against the manifest weight of the evidence presented by the State."

Our examination of the record leads us to conclude that the court's refusal to grant defendant's motion for judgment of acquittal and the jury verdict were supported by substantial evidence. See, State v. Wallen, 21 Ohio App. 2d 27 (1969). Assignment overruled.

Assignment of Error No. 12

> "The trial court committed prejudicial error when it refused to allow discovery of prior statements and grand jury testimony of two key State witnesses, who were in fact co-defendants, in contravention of Ohio Criminal Discovery Rules."

Crim. R. 16 clearly expands discovery beyond the scope previously enunciated in cases such as State v. Laskey, 21 Ohio St. 2d 187 (1970), and State v. Patterson, 28 Ohio St. 2d 181 (1971). The broadening accorded by this rule,

however, should not be extended further by a distorted reading of the rule. Crim. R. 16(B)(1)(a)(iii) mandates the disclosure of the recorded testimony of a co-defendant before a grand jury. Richard Strum and Rudolph Trivonovich were not co-defendants. Therefore, the discovery authorized by Crim. R. 16(B)(1)(a)(iii) does not include their recorded testimony before the grand jury. Accordingly, we overrule assignment number 12.

Assignment of Error No. 13

> "The trial court committed prejudicial error when it refused to recall a key State witness for cross-examination after defense counsel had for the first time seen prior statements of that witness just before cross-examination."

The decision to grant or refuse additional cross-examination of the prosecution witness, after defense counsel's cross-examination had been completed, is within the sound discretion of the trial judge. The record reveals that the trial judge permitted defense counsel one hour and forty minutes to examine prior statements made by the witness and further permitted both defense lawyers to cross-examine the witness. That period of cross-examination lasted for one hour and eighteen minutes. Under these circumstances, the court's refusal to allow additional cross-examination constituted no abuse of discretion. This

assignment is overruled.

Assignment of Error No. 14

"The trial court committed prejudicial error by allowing the jury, during its deliberations, to have read to them by the court reporter isolated testimony of a key State witness."

Causing all or part of the testimony of a witness to be read to the jury, upon their request, after their retirement for deliberation is within the discretion of the trial court. State v. Berry, 25 Ohio St. 2d 255 (1971). We find no abuse of discretion here. Furthermore, the record shows that defendant's counsel specifically expressed satisfaction with the court's answer to the jury's query. See, State v. Woodards, supra. Assignment overruled.

Assignment of Error No. 15

"The trial court committed prejudicial error when it allowed the State, during its closing argument, to misstate the law and make clear and strong references to a burden the defendant had to prove himself innocent."

Upon conclusion of the State's case, certain reasonable inferences, adverse to the defendant if unrebutted, may be drawn by the trier of facts. Then the burden of going forward with the evidence to rebut these inferences shifts to the defendant. See, e.g., 21 Ohio Jur. 2d Evidence &157. In final argument, the prosecutor may comment on the state of the evidence. State v. Marshall, 15 Ohio App. 2d 187

(1968). He may even comment on the defendant's guilt as long as his unsupported personal beliefs are not interjected. Jones v. State, 11 Ohio App. 441 (1919). We find that the prosecutor's remarks pointing out that the defendant had not rebutted the adverse inferences of the State's evidence were not improper and can, in no way, be equated with impermissible commenting upon the defendant's failure to take the stand.

We further note that the prosecutor's comments were "invited" by defense counsel's closing argument. State v. Bridges, Summit No. 7628 (May 21, 1975). No objection was made to the remarks with the exception of the last remark (Transcript, Vol. II, p. 249), which was possibly covered by a "running exception" previously granted by the trial judge (although, arguably, the record indicates that defense counsel's objection was directed to another aspect of the prosecutor's argument, not now alleged as error). See, Scott v. State, 107 Ohio St. 475 (1923); State v. Lancaster, supra. Accordingly, we reject this assignment.

Assignment of Error No. 16

"The trial court committed prejudicial error when it overruled defendant's motion for a new trial on the grounds of newly discovered evidence."

Granting of a motion for new trial on the ground of newly discovered evidence is within the discretion of the trial judge. For a refusal to constitute an abuse of discretion, it must appear to the reviewing court that there is a "strong probability that the newly discovered evidence will result in a different verdict." State v. Lopa, 96 Ohio St. 410 (1917). Upon review of the record, including the transcript of the hearing on the motion, we find no abuse of the trial court's discretion. The assignment is overruled.

Assignment of Error No. 17

"The trial court committed prejudicial error in sentencing the defendant to the death penalty in that:

"(A) Prejudicial error was committed in convicting and sentencing defendant pursuant to Ohio Revised Code Section 2903.01, 2929.03 and 2929.04 as such sections unconstitutionally permit arbitrary imposition of the death penalty, such arbitrary procedures being held in violation of the United States Constitution in Furman v. Georgia; and

"(B) Prejudicial error was committed in sentencing the defendant to the death penalty as imposed by Ohio Revised Code, Section 2929.04 as said section constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitituion and Article I, Section 9 of the Ohio Constitution."

This assignment was discussed in detail by Judge Hunsicker of this court in State v. Bayless, supra. We

overrule this assignment.

Having overruled all assignments of error, we affirm the judgment.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Court of Common Pleas to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Ten days from the date hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. App. R. 22 (E).

Costs taxed to appellant.

Exceptions.

William H. Victor
Presiding Judge
- for the Court -

VICTOR, P.J. and
BRENNEMAN, J. CONCUR.
(Doyle, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment under authority of Section 6.(C), Article IV, Constitution).

THE STATE OF OHIO
Summit County ss:

COURT OF COMMON PLEAS

SEPTEMBER Term 1975

THE STATE OF OHIO
vs.
STACEY LANE

No. CR 75 5 601

JOURNAL ENTRY

THIS DAY, to-wit: the 11th day of September A.D., 1975, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, STACEY LANE, being in Court with counsel, W. DICK COOMBS and MICHAEL C. CONWAY, for further hearing on mitigating circumstances heretofore begun on September 10, 1975, and, not being completed, continued until this day, to-wit: The 11th day of September A.D., 1975, at 9:00 O'Clock A.M., said hearing being conducted for the reason that heretofore on July 24, 1975, the Defendant, STACEY LANE, was found Guilty by a Jury of the crimes of AGGRAVATED MURDER, as contained in Count Number One (1), Specification One (1) to Count One (1) 2929.04 (A) 3 and Specification Two (2) to Count One (1) 2929.04 (A) 7, and AGGRAVATED ROBBERY, as contained in Count Two (2) of the Indictment herein.

AND THIS DAY, to-wit: The 11th day of September A.D., 1975, upon due hearing and consideration of all reports and evidence presented, the Court finds that there are no mitigating circumstances present.

THEREUPON, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

THEREUPON, IT IS THE SENTENCE OF THE LAW AND JUDGMENT OF THE COURT that the said Defendant, STACY LANE, be taken hence by the Sheriff to the Summit County Jail and there safely kept and that within Twenty (20) Days he be conveyed to the CHILLICOTHE CORRECTIONAL INSTITUTE at Chillicothe, Ohio, and thereafter be delivered to the Warden of the SOUTHERN OHIO CORRECTIONAL FACILITY at Lucasville, Ohio, and that he be there safely kept until the 11th day of January A.D., 1976, on which day, within an enclosure, inside the walls of the said SOUTHERN OHIO CORRECTIONAL FACILITY, prepared for

that purpose according to law, the said Defendant STACEY LANE, shall be electrocuted by the Warden of the said SOUTHERN OHIO CORRECTIONAL FACILITY, or in case of the Warden's death or inability or absence, by a Deputy Warden of said Institute; that the said Warden or his duly authorized Deputy shall cause to pass through the body of the said STACEY LANE a current of electricity of sufficient intensity to cause death and that the application of such current of electricity shall be continued by said Warden of said Institute or said Deputy Warden until the said Defendant, STACEY LANE, is dead, for punishment of the crime of AGGRAVATED MURDER, Ohio Revised Code Section 2903.01 (B), a Special Felony; and further that the said Defendant be sentenced for an indeterminate period of not less than SEVEN (7) YEARS and not more than the maximum of TWENTY-FIVE (25) YEARS for punishment of the crime of AGGRAVATED ROBBERY, Ohio Revised Code Section 2911.01 (A) (1) and/or (2), a felony of the first (1st) degree; and that the said Defendant pay the costs of this prosecution for which judgment is hereby rendered against him; including counsel fees to be set at a later date to be allowed to Attorneys W. DICK COOMBS and MICHAEL C. CONWAY; said monies to be paid to the Summit County Clerk of Courts, Court House, Akron, Ohio, 44308.

THEREUPON, the Court informed the Defendant of his right to appeal pursuant to Rule 32 (A) (2) of the Criminal Rules of Procedure, Ohio Supreme Court, at which time the Court ordered that Attorneys PATRICK W. SEMEGEN and CHARLES E. GRISI be appointed for purposes of appeal.

IT IS FURTHER ORDERED that the sentence imposed for punishment of the crime of AGGRAVATED ROBBERY shall be served CONSECUTIVELY and not concurrently with the sentence imposed for AGGRAVATED MURDER in the event

No. _____ Page _____

Journal _____

COMMON PLEAS COURT
Summit County, Ohio

JOURNAL ENTRY

THE STATE OF OHIO

vs.

-22-

Entered _____ 19__

Hon. _____ Judge Presiding

THE STATE OF OHIO
Summit County ss:

COURT OF COMMON PLEAS

SEPTEMBER Term 19 75

THE STATE OF OHIO
vs.
STACEY LANE

No. CR 75 5 601

JOURNAL ENTRY

PAGE TWO

that the capital punishment sentence is ever reduced to life imprisonment.

APPROVED:
September 11, 1975

JOHN H. SHOEMAKER
Assistant Prosecuting Attorney
am

LAWRENCE B. COMANOR
Assistant Prosecuting Attorney

L. A. LOMBARDI, Judge
Court of Common Pleas
Summit County, Ohio

cc: Attorney W. Dick Coombs
Attorney Michael C. Conway
Attorney Patrick W. Semegen
Attorney Charles E. Grisi
Psycho-Diagnostic Clinic
Booking Desk
Adult Probation Department

EXCERPTS FROM VOLUME I OF THE TRANSCRIPTS

Juror 63.

Cheryl D. Koshar, Juror Number 70.

Elizabeth Walker Juror No. 69.

Lastly, we have here John W. Telesca. That covers all the ones --

THE COURT: Other than the ones excused in court this morning.

MR. CONWAY: Your Honor, we would like to represent to the Court at this time Mr. Coombs and myself met with our client, Stacey Lane, and informed Mr. Lane that in court this morning while he was not present there were ten jurors that were excused for medical reasons, reasons for lack of service of the order, and there were some who were out of jurisdiction, and we explained to Mr. Lane that we acknowledged to the Court that we would excuse these jurors and he concurs in our doing that.

THE COURT: All right, thank you. Is that correct, Mr. Lane?

THE DEFENDANT: Yes.

THE COURT: So that counsel for the Defendant may be on the record. Let the record show that counsel for the Defendant wish to inquire of every prospective juror and go into the question as to whether or not any of the prospective jurors were for or against capital punishment, and the Court has advised them that the Court will not permit that question to be gone into,

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inasmuch as the Court feels that the charge will be that the jury shall not take into consideration any question of punishment. Counsel for the Defendant object thereto, and the Court granted them an exception as to each and every juror who is questioned in this case, and the Court refuses to permit them to inquire as to their views on capital punishment.

I think that saves the record for you, gentlemen, is that satisfactorywith you?

MR. SHOEMAKER: The State of Ohio has no position one way or another, that being between the Court and defense counsel.

THE COURT: Is there anything else we should take up?

The Court has said it is going to permit counsel for the defendant and the prosecutors to do all the interrogation as to the qualifications of the jurors, and the Court will not ask any questions, unless of course the Court feels there might be a question that should be gone into. Generally, the counsel go into every question that they deem necessary to select a fair and impartial juror, other than the question of capital punishment.

MR. SHOEMAKER: This is Mr. Brady. Have a seat here, Mr. Brady.

THE COURT: It doesn't look like you have very much confidence in our jury system.

EXCERPTS FROM VOLUME II OF THE TRANSCRIPT

What happened when you sat down and had a beer?

What happened next? Did you have any conversation?

A Yes, we did.

Q Would you relate this conversation to us?

A Pardon?

Q Could you tell us about those conversations?

A My brother Stacey asked me if there would be anybody in the florist shop.

Q What did you say?

A I said probably, but I'm not too sure.

Q Okay. What was said next?

A He said, "Are you sure?" and I said, "I'm not positive."

Q And what was said after that?

A He said he was going to rob her.

Q Going to rob her?

A The florist shop.

Q Okay. What was said after he said he was going to go and rob the florist shop?

A We tried to talk him out of it.

Q Who is we?

A My sister-in-law, Patty, and my brother Rudy, and myself.

Q What was said when you tried to talk him out of it?

A I don't understand.

Q Excuse me.

A Nothing.

Q What do you mean nothing?

A Just didn't listen.

Q All right. He didn't listen to what you said?

A Yes.

Q What did you tell him in particular?

A I said, "You don't want to go back to the penitentiary, do you?"

Q What did he say?

A He didn't say nothing.

Q What was said next? Was there any discussions about wearing masks?

A Yes.

Q What was said about that?

A We asked him why didn't he wear a mask.

MR. CONWAY: We object to this whole line of testimony.

THE COURT: Approach the bench.

- - -

(Discussion between Court and Counsel.)

- - -

THE COURT: Overruled.

BY MR. COMMOR:

Q When you asked him why didn't he wear a mask, what did he say at that time?

A Because he didn't want to be identified.

A Yes, I will. I was at the house on Kreider.

Q That is your regular home?

A Right.

Q Who was there with you at the time?

A My grandmother and my brother Bill.

Q Did anybody come over at that time?

A Yes.

Q Who was that?

A My brother Stacey.

Q What happened when he came over?

A We went out for a little ride.

Q What was said in the ride, if anything?

A He asked me if I was scared, and I said, "Yes."

Q What else was said?

A He said, "Don't worry about it." Then he said that he was scared too.

Q Okay. Was anything else said?

A No.

Q Okay. Now, Mr. Sturm, I want to ask you, when the police first came and investigated this case, did you tell them everything that you told us here today?

A No.

Q Why didn't you?

A I wanted to protect myself and protect my brother.

Q As a matter of fact, are you charged with a crime arising

out of this?

A Yes.

Q What crime is that?

A Obstructing justice.

Q Everything that you told us here today, was that the complete truth?

A Yes.

Q Did anybody promise you anything or threaten you with anything for testifying?

A No.

MR. COMANOR: No further questions, your Honor.

THE COURT: You may cross-examine.

MR. COOMBS: May we approach the bench, your Honor?

THE COURT: Approach the bench.

- - -

(Discussion between Court and Counsel.)

- - -

THE COURT: Ladies and gentlemen of the Jury, some question has been raised by Counsel, and the Court will have to declare a recess, because it is a matter for the Court and not for the Jury. You will now be excused for at least 15 minutes and take a 15 break, and

remember my admonition to you that I have heretofore given you, and as soon as we are ready, we will recall you. You are now excused about 15 minutes.

* * * *

R E C E S S

* * * *

MR. CONWAY: We want an exception to the overruling of our objection as to obtaining Richard Sturm's testimony before the Summit County Grand Jury pursuant to the Ohio Rules of Criminal Procedure as it is, the Defense can receive that testimony. The Court has overruled our obtaining that testimony, and to that overruling we take exceptions.

THE COURT: Approach the bench.

We will proceed.

Let the record show that the Court ordered that the Prosecutor turn over two different statements by the witness, Richard Sturm, and that they have had the statements in their possession, two separate statements, one -- how many pages -- 22 pages, and the other, how many pages?

MR. COOMBS: 19.

THE COURT: They have had them over an hour-and-a-half, and the Court has permitted them to have the statement for the impeachment of the witness on the stand. And since they have had them for an hour-and-a-half, and there are two lawyers, it is a question of only searching out inconsistent statements that he gave here. His testimony didn't last over 20 minutes. We will proceed with the cross-examination, and you may cross-examine him on the statements, and while one cross-examines, the other can be marking the other statements. We will give you all the time you want to cross-examine, as much time as needed.

MR. COOMBS: Only one attorney can cross-examine, your Honor; is that right?

THE COURT: Yes. If you want, in this case, I could make an exception, if you want to examine one statement and he examine the other, all I want to do is get along with it. Do you want to do it that way?

MR. COOMBS: Yes, your Honor.

THE COURT: Mr. Shoemaker, do you want to do it that way?

MR. SHOEMAKER: Well, the Court has

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Q Have you given other ones besides that?

A I only made two statements.

Q All right. Whether or not they are recorded, I am including conversations or questioning by the Sheriff or the Prosecutors, okay? Now, have you given, besides this statement, have you given them others?

A You mean talking to them? Yeah.

Q Conversation where you have told them things that differs from what you are testifying to?

A Yes, the first statement.

Q When was that?

A I couldn't tell you.

Q Wasn't it Saturday after the homicide?

A Well, they talked to me after that, right.

Q Generally, what did you tell the police and the Prosecutor respecting the first recorded statement?

A Say that again.

Q Just generally, what was your testimony about this matter?

A You mean --

Q The first recorded statement?

A I told them I didn't know nothing about it.

Q What else did you tell them?

A I told them a bunch of lies, that was it.

Q Do you have any idea how many lies you told them in that statement?

A No.

Q Do you remember how long that statement was?

A No.

Q Do you remember where the statement was given?

A You mean the recorded statement?

Q Yes.

A Yes, the Sheriff's Office.

Q Rick, you had worked at the florist shop, did you not?

A Yes.

Q How long did you work there?

A Quite a while.

Q How long is quite a while?

A I couldn't tell you.

Q You can't tell me?

A Pardon.

Q You couldn't tell me?

A No.

Q Years?

A Yes.

Q Several years?

A No, not several years.

Q Two years?

A Probably about two years.

Q All right. When did you quit working for them?

A He and Rick had a little fight like, because he lowered

my pay, so I quit right then.

Q I'm sorry, I didn't quite hear that.

A He lowered my pay, so I quit.

Q Okay. When was that?

A Probably around December.

Q December?

A Right.

Q And you say it was an argument?

A Right.

Q How serious was the argument?

A Not serious.

Q You just quit?

A Right.

Q What did you do after that?

A What did I do after that? What could I do?

Q Well, did you get another job?

A Right.

Q Where did you work then?

A At Rocky Drive-Thru.

Q Now, would you consider yourself a friend of Rick and Georgene Burse?

A Yes.

Q Would you have occasion to go to their house for social events?

A Yes.

body moved after he shot her the first time, or when he was shooting her, and he said that after he shot her the first or second time she didn't move at all.

Q All right. Who was there at the time that you had this conversation that you have just related to us?

A Erica might have been, Patty's daughter might have been there. Nobody else was. I don't remember if Erica was or not.

THE COURT: Erica is the two-year-old? I didn't get it, who was there?

THE WITNESS: My sister-in-law's daughter, Erica.

THE COURT: The sister-in-law's daughter.

BY MR. COMANOR:

Q Okay, Mr. Trivonovich, did anyone return shortly after this particular conversation you have just described?

A Patty came in. My sister-in-law came in about seven o'clock with Bill, one of my younger brothers.

Q What is Bill's full name?

A William Sturm.

Q Now, I'm going to call your attention to the next day. Did you have an occasion on the next day to have a discussion in relation to these events in the flower shop and around about the flower shop with Stacey Lane?

A Yes.

Q Where were you when the discussion was held?

A I don't remember. Again, I don't remember just where we were. Probably at the apartment early in the morning before anybody left the house.

Q Are you sure about the time or are you estimating?

A I'm not sure it was the morning either. It was the next day.

Q All right. What was said?

A We were talking about how to dispose of that gun that he used. Stacey wanted to bury it somewhere, so that he would be able to go get it if he wanted it again. I wanted him to throw it in the lake so nobody could get it again so it would be gone.

Q All right. Mr. Trivonovich when the police first came around and asked you questions and were investigating this homicide and robbery, did you tell them the full story as you have told us today?

A No, sir.

Q Could you tell us why you didn't?

A I didn't want to tell them that Stacey shot that lady in the flower shop. I didn't want to tell them.

Q Why?

MR. COOMBS: I object, your Honor.

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THE COURT: Yes, a "Why" question is not proper.

MR. COMANOR: Okay.

BY MR. COMANOR:

Q Are you charged with a crime arising out of this entire happening?

A Yes, sir.

Q What crime is that?

A Obstruction of justice.

Q Have you told us the full truth today here?

A Yes, sir.

Q Has anyone promised you or threatened you with anything to come in here and tell this?

A No.

MR. COMANOR: No further questions.

THE COURT: You may cross-examine.

MR. CONWAY: May we approach the bench.

- - -

(Discussion between Court and Counsel.)

- - -

THE COURT: Ladies and gentlemen of the Jury, I am going to recess you to give Counsel for the Defendant time to examine a written statement given by this Defendant and

Jury Room to continue their deliberations at 5:50 o'clock, p.m.)

- - -

VERDICT

THE COURT: Mr. Rusinoff, has the Jury reached a verdict?

THE FOREMAN: Yes, they have, your Honor.

THE COURT: Would you deliver it to the acting Bailiff, please?

I have a verdict here:

We the Jury in this case, being duly impaneled and sworn to well and truly try and true deliverance make between the State of Ohio and the Defendant Stacey Lane do find him guilty of aggravated murder as charged in count one of the indictment.

And we do find the Defendant guilty of specification one to count one aggravated murder, to-wit: that said offense was committed for the purpose of escaping detection and apprehension, trial or punishment for another offense committed by the Defendant, to-wit: aggravated robbery.

And we do find the Defendant Stacey Lane guilty of specification two of count one aggravated

murder, to-wit: the killing of Georgene Durse was committed while said Defendant was committing, attempting to commit, or fleeing immediately after committing, or attempting to commit aggravated robbery.

And we do so render our verdict upon the concurrence of twelve members of said Jury. Each of said Jurors concurring in said verdict, signs his name hereto this 24th day of July, 1975.

I will now proceed to poll the Jury.

Members of the Jury, as I ask you, would you please respond "It is my verdict" or "Is not my verdict

Mike Rusinoff, is this your verdict?

MR. RUSINOFF: It is my verdict, your Honor.

THE COURT: James Cross?

MR. CROSS: It is my verdict, your Honor.

THE COURT: James Guspoden?

MR. GUSPODEN: It is my verdict.

THE COURT: Paul Chinrock?

MR. CHINROCK: It is my verdict.

THE COURT: Elmer Plouri?

MR. PLOURI: It is my verdict.

THE COURT: Paul Chinrock?

EXCERPTS FROM VOLUME III OF THE TRANSCRIPT

A Yes. It was in the evening.

Q But do you know the month?

A No, I don't. I don't remember that.

THE COURT: What year was it, please? I didn't hear that.

BY MR. COOMBS:

Q What year was it, ma'am?

A I really don't know.

Q 1965? Does that help?

A I think so.

Q Do you know how old Stacey was when he had this accident?

A He had just turned 16.

Q Generally, what type of accident was it?

A It was an automobile accident.

Q And do you recall what the injuries were to Stacey?

A Well, he had a brain concussion.

Q Do you know whether or not he had a fractured skull?

A Yes, they say he did. The doctors said he had one.

Q Do you know what hospital he was in?

A In Children's.

Q Was he in another hospital prior to that?

A First they took him to Wadsworth Hospital, and my husband transferred him out of Wadsworth Hospital, because it wasn't a decent hospital for him to be in.

Q Then he went to Children's Hospital?

A Yes.

Q Did you see him in both hospitals?

A No, I didn't see him in Wadsworth; my husband did.

Q Did you see him in Children's Hospital?

A Yes.

Q Was he conscious or unconscious?

A He was unconscious.

Q Do you know how long he was unconscious? If you recall?

A 10 days.

Q How long was he in the hospital total?

A About 21 days.

Q Now, did he have any physical or medical treatment, rather, after his release from the hospital?

A Oh, he had to go back to the doctor for examination, check-ups, and stuff like that.

Q What doctor was that, do you know?

A Doctor Baird.

Q And do you know when the last time was that he went to a doctor as a result of this accident you have described?

A No, I don't.

Q Did you ever notice anything different in his attitude or his personality after this accident?

A You mean after he came back from prison, or what are you talking about?

Q No. After the accident, ma'am. Anytime after the

Q Doctor, before, in your report, would you tell us how, based on your report of August 13, 1975, how do you categorize Stacey Lane?

A You mean by way of a diagnostic category?

Q Yes.

A I would characterize him as a schizoid personality with some anti-social features. Schizoid personality and anti-social personality.

Q Is a schizoid personality individual a psychotic person?

A He is not.

Q He is not?

A No.

Q Doctor, based on your education and training as a psychiatrist, and to a psychiatric certainty, and keeping in mind the definition that you gave this Court of psychosis, I am going to read you a paragraph, Doctor, under — on the page of the report that you have in your hand, where it says "present history". My question, Doctor, after I read this paragraph, is this not an example of an individual who is psychotic? And it reads as follows: According to the information available from the police, he tore up his house, and at the same time he took an overdose of some medication, supposedly amphetamines, and ran out of the house nude. He then broke into two houses and threatened the residents.

..When police arrived, the patient was sitting on the ground sucking his hands, which were bleeding. And he was taken to Barberton Citizens Hospital, where he was treated for two days from his wounds and his overdose On his left hand he received many stitches and his right elbow was bandaged. He was then transferred here.

Is not that a description, Doctor, a description of a psychotic person?

A Yes, I would agree.

Q Doctor, if I told you that the description that I have just read and the acknowledgement that you made that this is an indication of a psychotic person --

A At that particular time.

Q Yes. And I told you that this individual was the one and same Defendant, Stacey Lane, would this cause you to change your opinion as to your psychiatric evaluation of him?

A It would not, for the sole reason this report from the hospital to me, it sounds like it is a temporary sort of psychosis, particularly knowing fully well that Mr. Lane had been used to using drugs or abusing drugs, and also used to drinking excessively; it is quite possible that one of these two factors might have precipitated this condition. There is no mention of the affect of his not--

Q Did you also state earlier that extensive use of alcohol and drug abuse could?

A Yes, I did.

Q Based on your experience as a psychiatrist, to a psychiatric certainty, be a cause of a psychotic state?

A It could produce a psychotic state, which usually remits itself within about 24 to 72 hours.

Q Okay. If that individual who performed the act that was described in the statement that I have read to this Court, based on your opinion as a psychiatrist, Doctor, and to a reasonable psychiatric certainty, assuming that there has been continuous excessive use of alcohol and drugs, have we not in fact, Doctor, is that person not a psychotic person?

A At this particular time this evaluation was done, it looks like he must have been. Very clearly, he has been at this particular time.

Q Please, sir?

A It is very clear that he has been psychotic at that particular time, this particular report was written. However, at that time he was under the care of this particular physician.

THE COURT: What was the date of that?

MR. CONWAY: March 29, 1975.

Your Honor, the date on the report, if I may --

BY MR. CONWAY:

Q Doctor, based on your experience as a psychiatrist, and to a reasonable psychiatric certainty, is it possible sir, for a psychosis, for psychosis to develop as the result of an unhappy childhood?

THE COURT: Mr. Conway, you will have to put it in a sphere of probability and not possibility. You placed it in possibility. Rephrase it.

BY MR. CONWAY:

Q Doctor, based on your experience as a psychiatrist, and to a reasonable psychiatric certainty, can a psychosis be developed from an unhappy childhood?

MR. COMANOR: I'm going to object to an unhappy childhood, your Honor. I don't know what that means medically.

THE COURT: It is too indefinite. Sustained.

MR. CONWAY: Okay.

BY MR. CONWAY:

Q You did say that your report — withdraw the question.

MR. CONWAY: I have no further questions.

MR. COMANOR: Just a few short

MR. CONWAY: Would you mark this for us, please.

(Defendant's Exhibit P, being a brain scan was marked for identification by the Reporter.)

BY MR. CONWAY:

Q Doctor, handing you what has been marked Defendant's Exhibit P, they are the electroencephalogram and the brain scan?

A Right.

Q Okay, Doctor, I am going to refer you to the second page, the electroencephalogram looking in the body headed description, if you know, Doctor, can you enlighten us as to what is meant by the overall record is of somewhat low voltage? Do you know what they are referring to?

A Yes. The voltage may be high or it may be low. They are measuring the electricity or electrical discharge resulting from brain function.

Q From brain function?

A Right.

Q Okay. What would low voltage be? If you know? Signify?

A To me, it would not signify abnormality. It would still

be in the normal range.

C Okay. Did you say, however, Doctor, that the reports are not, the examination is not -- withdraw.

Q Doctor, I earlier described to you or read to you a description of a situation in an individual, and you referred or you stated that in your expert opinion, and to a reasonable psychiatric certainty, that that was an example of psychotic behavior? Do you recall the piece I read you?

A Yes, I do. To be specific, it referred to a psychotic episode.

Q Doctor, if I told you that that individual described in there was the Defendant, Stacey Lane, based on your experience as a psychiatrist, and to a reasonable psychiatric certainty, does this not describe a psychotic person?

A It does describe a psychotic episode in this gentleman.

Q Okay, sir.

MR. CONWAY: I have no further questions. Thank you.

MR. COMANOR: Just a few brief questions, Doctor.

CROSS-EXAMINATION BY MR. COMANOR:

Q First of all, there were some questions of your credentia at the beginning of your testimony; and I noted at the

equivocation no ambiguity. The Defendant has no mental deficiency and he has no mental illness. And finally, Doctor Gunter, President of the Psychiatric Society, Diplomat in the field of psychiatry, you heard about his background, and Doctor Gunter said the same thing in his report and his testimony, that the Defendant has no mental deficiency and the Defendant has no mental illness. The evidence is clear, your Honor.

THE COURT: The Court has before it the chart from the Children's Hospital, the emergency room report, together with the educational data of the Defendant, the pre-sentencing investigation report made by the Adult Probation Department, the psychologist's analysis made by Doctor Daniel Reinhold of the Psycho-Diagnostic Clinic; and I am mindful -- I made extensive notes of the doctors who did testify here, the psychiatrists and the psychologist, but all of them in their conclusions, all conclude that the Defendant in this case -- and Doctor Kaiser here, he considered the neurological evaluation which he has made for the Court, and which the Counsel

for the Defendant has had in their possession, and I note on the bottom of page two, and he analyzed the neurological evaluation. He says this type of brain damage does not greatly effect his behavior, and should not be considered the basis for cause of his serious behavior problems. And then he ends up and says that it is his opinion that he is not mentally deficient and functions intellectually more like the average or normal person of the general population. He has the ability to perform daily activities in an appropriate manner and knows the difference between right or wrong. He is not mentally ill in a legal sense, but is a disturbed individual in a psychiatric or psychological sense. He has many personality and character problems, but he is in contact with reality and does not demonstrate hallucinations or delusions. He does demonstrate minimal or borderline brain disfunctioning in the area of immediate, immediate recall. However, it is memory recall. However, it is my professional opinion that this is not the cause of his action or behavior.

The other Doctor, Doctor Gunter, who says

that this man is not mentally deficient. He is not mentally affected and he is not diagnosed as mentally ill or psychotic. And he says the brain damage is not brought out in any other way during the psychiatric history and examination and neurological history. He testified that the brain scan showed there was no -- I think the thing that he was interested in was whether or not there was any -- I think he was looking for -- it was a question of -- where is what I'm looking for -- any epileptic type episodes. He says he finds none. The brain scan itself was negative. And I must remind the Defendant's Counsel that the burden of establishing mitigating circumstances, the burden is upon them to show the same by a preponderance of evidence, and all the doctors who testified do not feel that this man is mentally deficient or defective. And therefore, the Court finds there is no mitigating circumstances, as provided for under the statute.

And therefore, at this time, the Court would inquire of the Defendant's Counsel if before sentence is imposed, whether or not there is anything further you might say to the Court.

MR. COOMBS: We have nothing further, your Honor.

THE COURT: Mr. Conway?

MR. CONWAY: No, sir.

THE COURT: And Mr. Lane, is there anything further you wish to say to the Court at this time?

THE DEFENDANT: No, your Honor.

THE COURT: If not, you will please stand.

The second count in the indictment charges you with aggravated robbery. So on that charge, it is the sentence of the law and the judgment of the Court that you be taken hence to the Summit County Jail, and there to be safely kept, and within 20 days -- and I fix 20 days so that you will have time to consult with Counsel locally rather than the usual five days -- and at the end of 20 days you will be conveyed by the Sheriff of Summit County to the Ohio State Penitentiary, and there to serve a sentence not less than seven nor more than 25 years for the crime of aggravated robbery as provided by the laws of the State of Ohio.

And as to the crime of aggravated murder,

the Court finds from a review of all of the reports, the testimony, the statements, and arguments of Counsel, and upon consideration of all these matters, that there is no mitigating circumstance in this case wherein the Defendant, Stacey Lane, has been heretofore convicted of aggravated murder. It is therefore considered and adjudged and decreed, and it is the sentence of the law and the judgment of the Court that the Defendant, Stacey Lane, be taken hence to the Summit County Jail, and there to be safely kept, and within 20 days the Sheriff of Summit County, Ohio shall convey the Defendant, Stacey Lane, to the Ohio State Penitentiary at Lucasville, Ohio, and then on the 11th day of January, 1976, that the warden of the Ohio State Penitentiary, within the walls of that pentitentiary, and within an enclosure for that purpose, and under the direction of the warden of the Ohio State Penitentiary shall cause a current of electricity of sufficient intensity to cause the death, to pass through the body of said Stacey Lane, and the application of said current shall be continued until the said Stacey Lane is dead as provided by the

laws of the State of Ohio for the crime of aggravated murder of one Georgene Burse.

May God have mercy on your soul.

The Sheriff's Deputies may now take the Defendant back to the jail.

- - -

(Thereupon the hearing was concluded at 10:37 o'clock, a.m.)

- - -

BEST COPY AVAILABLE

PSYCHIATRIC EXAMINATIONS OF STACEY LANE

836-2793

LICENSED PSYCHOLOGIST
OHIO BOARD OF PSYCHOLOGY

MERLE D. KAISER, PH.D.
CLINICAL PSYCHOLOGIST
1655 WEST MARKET STREET, SUITE 435
AKRON, OHIO 44313

PSYCHOLOGICAL TEST REPORT

CONFIDENTIAL
NO PART OF THIS REPORT IS TO BE
QUOTED TO PATIENT OR FAMILY

NAME: Stacey Lane (SS#270-50-0293)

AGE: 25 years (DOB 2/10/50)

DATE TESTED: August 4, ~~1950~~ 1975

REFERRED BY: Daniel B. Reinhold, Psychologist/Administrator,
Summit County Psycho-Diagnostic Clinic

TESTS ADMINISTERED: Wechsler Memory Scale - visual Phasing - basic drop
Wechsler Adult Intelligence Scale
Memory for Designs - Visual)
Rorschach Ink Blot Test
Minnesota Multiphasic Personality Inventory

INTRODUCTION

This twenty-five year old, white, unmarried male was tested at the Summit County jail on August 4, 1975. He was cooperative at all times and readily became involved in the testing situation. The results are valid for him at this time.

The client has been convicted of aggravated murder and may possibly face the death penalty. The psychological evaluation was done to determine whether or not the client is mentally ill or mentally deficient. Stacey is about five feet nine inches tall but only weighs one hundred twenty-eight pounds. He is extremely undernourished and thin. The client has long, wavy brown hair and a mustache.

Stacey has a juvenile and adult criminal record including confinement at the Federal Correctional Institute at Tallahassee, Florida. He has not worked for more than five or six months in any job but he did begin management training with the Red Barn Restaurant food chain. He completed high school by passing the GED tests in 1970. He was never given psychological tests prior to this time.

INTELLECTUAL EVALUATION

The Wechsler Adult Intelligence Scale yielded a full scale IQ of 100 for the client. This places his level of general mental ability within the normal or average category. The classification includes IQ scores of 90 to 109 and is characteristic of about fifty per cent of the general population. His judgment and common sense for dealing with daily activities are adequate. He is able to deal appropriately with people in social situations and he has good verbal concept formation. He is in contact with reality. There is no significant differences between his verbal and performance abilities (Verbal IQ 102 vs. Performance IQ 98).

PERSONALITY EVALUATION

The objective and projective personality assessing devices clearly show that the foundation underlying his personality structure involve rebelliousness and hostility.

He is egocentric, self-indulgent, evasive and consistently resentful and argumentative. The client will not readily admit to his own responsibility for difficulties and will deny psychological problems. He will exhibit poor judgment, will be suspicious and will show an exaggerated need for attention and affection. Somatic complaints are often reported by people of this type and they include spells of amnesia, delusions and cardiac complaints. People of this type do not often respond to treatment.

Many people are unable to cope with the stress and strain placed on them by society and resort to the use of alcohol and/or drugs as a means of coping with frustration. Others may use tobacco to excess or overeat. These test results indicate that Stacey Lane may fall within this category. He answered the test questions in a manner characteristic of the alcohol addicted individual or the problem drinker. Drug abusers often respond to the test questions as did this client. This area of his functioning should be examined by his counselor.

CLINICAL OBSERVATION

The client's affect was rather flat during the interview and his voice was soft, at times almost a whisper. He was cooperative and rapport was good. Stacey Lane is of moderate height but very thin and undernourished. His features are delicate and moderately handsome. He has long wavy hair and a mustache. No delusions or hallucinations were elicited during the interview; however, he did describe several reoccurring frightening dreams that he had weekly up to the age of about fifteen. He often jumped out of bed and ran from the house at the conclusion of the dreams. The two main themes of his dreams were a large black vampire bat that would chase him and try to suck blood from his throat and a large evil looking monster that would chase him and try to squeeze the air from him.

He described his use of alcohol and drugs as moderate but when asked to discuss his daily intake of these substances, he related that when not working he would drink about nine or ten bottles of beer a day. His drinking pattern included three beers in the morning to be followed by a light lunch and then three beers slowly consumed during the afternoon and about four after supper. He smoked marijuana several times each day and used amphetamines to keep awake and active when he had to work. His consumption of these substances increased on the week-ends if he had the necessary funds. He eats very little and periodically stops using amphetamines so that his body can recover. The client most definitely is drug dependent (marijuana and amphetamines) and is a habitual excessive drinker.

NEUROLOGICAL EVALUATION

We are dealing here with an individual who has a limited or specific type of brain dysfunctioning. He is brain-disordered in the area of immediate recall. His logical memory for immediate events and his rote memory are below the average or normal level for people of his age group. The client's visual-perceptual problem solving ability is very weak. Also, his psychomotor speed and the related learning process is severely retarded. This is often found among those who are pathologically depressed and less frequently among certain schizophrenic conditions. In summary, it can be said that the client's physical-motor coordination is intact but that he suffers immediate memory loss; i.e., he finds it difficult to remember immediate events but can remember situations and data from long in the past. In a young person of twenty-five this is often caused by extended use of alcohol and/or drugs. This deficiency often returns to normal after a long period of rest, proper diet and abstance from drugs and/or alcohol. This type of brain damage would not greatly effect his behavior and should not be considered the basis or cause of his serious behavior problems.

The client discussed with me an automobile accident in which he had been involved in 1965. He sustained a head trauma and was unconscious for ten days. Perhaps this accident and his extensive use of alcohol and drugs for many years could be the cause of his neurological deficiencies.

Psychodiagnostic Impression: (1) alcohol addiction, habitual excessive drinking
(2) drug dependence, marijuana and/or amphetamines
(3) paranoid personality with antisocial features

CONCLUSIONS

This individual is not mentally deficient and functions intellectually more like the average or normal person in the general population. He has the ability to perform daily activities in an appropriate manner and he knows the difference between right and wrong. The client is not mentally ill in a legal sense but is certainly a disturbed individual in a psychiatric and psychological sense. That is, he has many personality and character problems but he is in contact with reality and does not demonstrate hallucinations or delusions. He does demonstrate minimal or borderline brain dysfunctioning in the areas of immediate memory and recall. However, it is my professional opinion that this type of dysfunctionig is not the cause of his acting-out behavior.

Merle D. Kaiser, Ph.D.
Clinical Psychologist

D. V. RAMANI, M.D.
Psychiatrist
SUITE 2 ARCADE BUILDING
2105 FRONT STREET
CUYAHOGA FALLS, OHIO 44221

929-0995

August 13, 1975

Re: Stacy Lane

This single white male was interviewed in the Summit County Jail for a period of one hour on August 2, 1975 regarding a psychiatric evaluation. The purpose of the evaluation was to decide whether or not he is mentally ill or mentally deficient.

Stacy is presently incarcerated on charges of aggravated murder. He is alleged to have murdered a woman working in a flower shop. Stacy's past history consists of running away from home, being sent to a detention home, and shop lifting and also a series of breaking and entering. Stacy says he has been in trouble since the age of 12 or 13. He has spent all in all 56 months in various jails. He has been out a year. He admits to using drugs, and states he started in jail in Marion and Lucasville. He denies abuse of alcohol. There is no detrimental history of psychiatric hospitalization or treatment in the past. Stacy feels he never needed any psychiatric help or does not need it now. It is very apparent that Stacy has had repeated chances to learn from incarceration and obviously he has not done so. I doubt whether he has the capacity to learn a lesson from incarceration. Stacy's psycho-social history and school history have been pretty well dealt with by Mr. Reinhold and they are sufficient for this examination and I have nothing more to add in this area.

On examination Stacy was dressed appropriately in Jail clothes. He was well groomed, polite, and friendly. He was also very cooperative. He appeared to be depressed or apathetic in the beginning. However, he answered questions very well and very promptly and I got the impression that he did all he could to help me. He understood the purpose of this evaluation and that no information would be kept confidential since it had to be submitted to the court. Overall Stacy appeared to be of average intelligence. He did not exhibit any overt psychotic symptoms at the time of the examination. He was quite coherent, relevant, and lucid. He was well oriented and there was no memory impairment. There were no evidences of personality deterioration. He denied any hallucinations or any paranoid thinking, even though he was suspicious which I believe is due to his circumstances. For example, at the end of the interview he casually mentioned that he would not tell me certain things because it could hurt somebody because he doesn't mind being destroyed, but he would not want to ruin other peoples lives. After a little coaxing he concluded the statement by saying "I would rather not talk about it" quote on quote. His judgment and insight is considered to be appropriate to his day to day life style. Certain things that he said point out the fact that Stacy could be sort of a schizoid personality. He considers himself sort of an outsider looking in rather than participating in what is going on. On the other hand, he claims to have a few chosen friends and he also claims to have adequate heterosexual relationships including sexual relationships with members of the opposite sex. He also admits that he has been called a loner, but does not consider himself so.

He does readily admit that he will trust anybody if he has reasons to do so. There is a lot of anger in this young man which is rather inappropriate. For example, talking about a Polygraph Test, when I ask him whether he would take one, his answer was that he was willing to take one but they wouldn't give him one. Now they are asking him to take one and he will not accept. He feels that now by not taking one it would be the best way to get back at the system. When asked what he considers he has to lose by not taking a Polygraph Test as to what he has to gain by taking it, his answer was "He has nothing to lose anyhow". Stacy was reasonably calm and placid throughout the interview and there was no evidence of anxiety even though I could spot out some underlying depression.

In summary, as mentioned above, the specific questions which were requested of me can be answered by stating that Stacy is not in my opinion at this specific time mentally ill or mentally deficient. I hope this information will be of use to court in making a decision on this case. Thank you for referring this interesting young man to my attention.

D. V. Ramani, M.D.

DVR/krf

August 11, 1975

Psychiatric Examination on Stacey Lane: -

The above was examined on 6 August, 1975. He explains that the charge is aggravated murder and robbery and that he did not do it. There has been previous trouble with the Law, and he did time in a Federal Correctional Institution in Florida. Also some in Mansfield, 56 months altogether. There was a breaking and entering charge and taking cars to Florida and he was brought back here.

Regarding his health he was in an auto accident in 1965, at which time he was unconscious for ten days and was at Children's Hospital for 21 days. Also had an operation in Lucasville for left arm. Left arm is partly incapacitated and shows large scar in elbow region. He also had an ear infection with a discharge and odor and feels he should have more treatment for that. Also has a kidney infection. He has had some ear trouble all his life. His hearing is fair, he states, but on testing it is noted that he cannot hear wristwatch with right ear, but can hear same on left side. He has weakness of left eye, and this runs in the family. He never passed out or fainted, but when he gets up the blood rushed to his head. He never had a brain wave test, but had a skull x-ray at the time of his concussion and had a fracture in right orbital region. He states he is not nervous and has no medication that he is taking for nerves. His sleep is pretty good and he dreams a lot. His mother is quite nervous and on medication for that and also his migraine headaches. The youngest brother has a nervous condition and ulcers.

Mr. Lane never sees or hears things unusual or hard to explain or unreal. Also does not feel they talk behind his back or against him. He was deferred from Draft because of his arm injury.

At the time he took excessive medication allegedly in a suicide attempt, he actually was doing the opposite, he explains: He was trying to save his own life, since he feared someone might shoot him and he asked people to help him escape from that.

The accompanying records reveal a February 1975 description of homicide in a Summit County Florist Shop. The Stacey Sturm apparently is the same Stacey Lane Sturm mentioned in the I.D. Bureau report in which starting in 1968 his name is given as Stacey Lane. Record is fairly extensive.

In March 1975 he was hospitalized at a local mental hospital for irrational and threatening and confused behavior following his taking an overdose, possibly amphetamine. The hospital report indicates the name Sturm but apparently we are dealing with the same Lane. Also the report indicates 21 days of unconsciousness in 1965, but more likely this is in error, and

continued .....

Psychiatric Examination on Stacey Lane, continued: -

was only 10 days. He was diagnosed anti-social personality.

He does at this time relate a suicide attempt and from this has a delicate old scar on left wrist.

He is a little confused as to whether he worked for Red Barn in 1974 or 1975, month of April, but then remembers he got out of prison in April 1974 and thus worked until November 1974 when he quit.

His step-father drinks quite a bit, but never misses work. Mr. Lane is not active in any sports, but he can swim. His crippled arm made him feel inferior.

Essentially, in summary, we can confirm the report by Mr. Reinhold of 28 July. This report describes him as an inadequate individual and diagnostically I agree with this as well as with the diagnosis of anti-social personality made at the hospital with the latter diagnosis probably being more significant. It is not felt that he is mentally defective. Also he is not diagnosed as mentally ill or psychotic. However, it is strongly felt that he had at least one psychotic episode, most likely under the influence of excessive central nervous system stimulating drugs. Furthermore, he has a significant history of brain concussion with 10 days of unconsciousness and possible brain damage resulting therefrom. This brain damage is not brought out in any other way during the psychiatric history and examination and the neurologic history. The latter being in question regarding unconscious or epileptic type episodes. It may be that some light can be thrown on this in his psychological testing. Also it would seem desirable that he obtain an E.E.G. or brain wave test.

Sincerely,

MJG:lg

Martin J. Gunter, M.D.

Chas. Cheney
4713228

DATE	EXAM	CODE NO.	HOSP. PROFESS.
8/21/75	brain scan	57080x2	

RADIOLOGY CONSULTATION

AKRON GENERAL MEDICAL CENTER

X-RAY NO. 323934

ROOM NO.

No. 323934

SOC. SEC. NO.

[ ] IN [X] OUT [ ] ER [ ] HOUSE [ ] LAB [ ] HAIR [ ] CART [ ] PORT. [ ] URGENT [ ] STAT

SEX	MARITAL	AGE YRS.	BIRTH DATE	REFERRING DOCTOR
F			5/10/30	Reichold D

STREET ADDRESS | CITY-STATE-ZIP CODE | PHONE

EMPLOYER | DEPT. | CLOCK CARD NO.

INSURANCE PROVIDER: blo | CONTRACT NO. | HEALTH INS. NO. | OTHER RESPONSIBLE PARTY

REPORT:

BRAIN SCAN: The study was done with radioactive Technetium, and multiple views were obtained in conventional projections. The distribution of radioactivity is unremarkable, and the brain scan is negative.

IMPRESSION: Negative brain scan.

TS:jh
22

8 21 75

T. SCARLETT, M.D.

[redacted] REFERRING DOCTOR [redacted]

AKRON GENERAL HOSPITAL
NEUROLOGY LABORATORY

Unit No. ____

Name: [illegible handwriting] Age ____

Referring Doctor: [illegible handwriting]

Date: [illegible handwriting]

(Check Boxes for Tests Desired)

Electroencephalogram		Pain Threshold		Sweat Test	
Activated			uppers		upper
Electromyogram - uppers			lowers		lower
lowers		Vibratory Threshold			total
Chronaxie - uppers			upper	Tremogram	
lowers			lower		upper
Motor Conduction Velocities		Skin Temperatures			lower
uppers			upper	Fetal cardiogram	
lowers			lower	Photomotogram	
Sensory Conduction Velocities			orbital	Other	
uppers		Visual Perimetry			
lowers			peripheral		
Plethysmogram			central		
uppers		Nystagmogram			
lowers			caloric		
Audiogram			opticokinetic		

Referral History, Physical Exam, and Diagnosis (Note drugs being given)

[illegible handwriting] 1965 [illegible] accident

[illegible handwriting]

Description
The overall record is of somewhat low voltage. There is a mixed dominant alpha rhythm of 12 hz at 20 to 25 microvolts bilaterally through the posterior regions. Satisfactory low voltage 20 to 25 hz background activity is symmetrically distributed through the anterior regions. No sharp, slow, or paroxysmal activity is present.

Eye closure reaction is normal and there is bilateral driving to intermittent photic stimulation. He is stable during and following 3 minutes of good non fasting hyperventilation.

Signed ____

Consultant's Diagnosis
Normal record, awake.

8/67

Signed H. Shapiro, M.D. MD
AF

THE STATE OF OHIO,
City of Columbus.

19 77 TERM

To wit: January 13, 1977

State of Ohio,
Appellee,

vs.

Stacey Lane,
Appellant.

No. 76-838

ENTRY

(SUMMIT COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed, pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States, this stay will automatically continue pending final determinati of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

C. William O'Neil

CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 13th day of January 19 77

THOMAS L. STARTZMAN Clerk.

By Emil F. Caldarera Deputy.

G

S.L. 6 PAGE 20 76-6838

Supreme Court, U. S.
FILED
AUG 8 1977
MICHAEL RODAK, JR., CLERK

76-6838

IN THE SUPREME COURT OF THE UNITED STATES

May Term, 1977

No._____

STACEY LANE

Petitioner

-vs-

THE STATE OF OHIO

Respondent

****

ADDENDUM TO RESPONDENT'S ANSWER

TO

PETITION FOR A WRIT OF CERTIORARI

From the Supreme Court of Ohio

****

STEPHAN M. GABALAC
Prosecuting Attorney

CARL M. LAYMAN III
Assistant Prosecuting Attorney
Appellate Review Division
City-County Safety Building
53 East Center Street
Akron, Ohio 44308
216/379-5510

Counsel for Respondent

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216/375-7331

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Akron, Ohio 44308
216/253-1101

Counsel for Petitioner

76-6838

PETITIONER'S FIRST REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE OHIO CAPITAL PUNISHMENT STATUTES AND THE SENTENCE OF DEATH GIVEN TO PETITIONER VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PART B

THE OHIO STATUTES VIOLATE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS BY PLACING THE BURDEN OF PROOF UPON HIM WITH RESPECT TO THE ISSUE OF DEGREE OF CULPABILITY AND RESULTING PUNISHMENT.

In State v. Downs, 51 Ohio St.2d 47 (1977), (copy attached), the Ohio Supreme Court overruled paragraphs 11 and 12 of the syllabus of State v. Lockett, 49 Ohio St.2d 48, 358 N.E.2d 1062 (1976), and the language which appears in State v. Woods, 48 Ohio St.2d 127 at 135, 357 N.E.2d 1059 at 1065 (1976), which reads: "(t)his is particularly true since the defendant is required to establish duress or coercion by a preponderance of the evidence for purposes of mitigation." The opinion stated at page 53 that the trial court did not in either case

> "(require the) defendant convicted of aggravated murder to prove certain mitigating circumstances by a preponderance of the evidence in order to be sentenced to life imprisonment rather than to death..."

The sections cited were held to be dicta.

The Ohio Supreme Court in the Downs case held that neither the defendant nor the prosecution is required by

statute to offer testimony or other evidence of mitigating circumstances. Rather, the court has the initial responsibility to require that certain evidence be collected and certain examinations be made. From a careful consideration of those reports and evidence presented during the course of the trial, the judge, or panel of judges, decides whether mitigation is established by a preponderance of the evidence. This requires that the defendant bear the risk of nonpersuasion during the mitigation hearing, but does not impose an unconstitutional burden upon a defendant which would render the Ohio statutory framework for the imposition of capital punishment unconstitutional. Thus the defendant need not produce any evidence in the mitigation hearing, but if the evidence presented does not persuade the Court that a mitigating factor is present the defendant bears the risk of not presenting any evidence in support of mitigation.

Nor is the State constitutionally required to prove the lack of such mitigating factors beyond a reasonable doubt. The lack of mitigating factors is not an additional and constitutionally mandated element of a capital offense.

The State submits that any possible infirmity or misunderstanding with respect to the burden of proof in the mitigation hearing provided in R.C. 2929.04 has now been put to rest by State v. Downs, supra.

CERTIFICATION OF SERVICE

I, CARL M. LAYMAN III, being a member of the bar of the United States Supreme Court, do hereby certify, pursuant to Supreme Court Rule 33(3)(b), that one copy of the Addendum to Respondent's Answer to Petition for a Writ of Certiorari was mailed, first class postage paid, to: ALBERT S. RAKAS, Attorney at Law, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325 and PAUL PERANTINIDES, Attorney at Law, 829 Centran Building, Akron, Ohio 44308.

Carl M. Layman III

CARL M. LAYMAN III
Assistant Prosecuting Attorney
Appellate Review Division
City-County Safety Building
53 East Center Street
Akron, Ohio 44308

216/379-5510

****

A P P E N D I X A

OPINION FROM STATE V. DOWNS

****

State v. Downs, 51 Ohio St.2d (1977) was not of reproducible quality.